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Hostage Rights: Law and Practice in Throes of Evolution

by H.H.A. Cooper*

I. INTRODUCTION

We should look at what people do as well as what people say, because people often grumble about changing the rules without actually doing so.¹

Hostage-taking and hostage-holding have a long and convoluted history. While no one has given extensive treatment to the historical development of hostage-taking and hostage-holding, several modern commentators have noted their antiquity. These commentators have also discussed some of the changes they have undergone.² These changes have altered both the character of the activity itself and the purposes for which hostage-taking and hostage-holding are employed. Yet some of their earlier characteristics remain in a shadowy, though influential fashion.

The use of hostages is, undeniably, a device of great practical utility. Its renaissance in the 20th century is due in no small measure to an astute appreciation of that utility. In recent times,³ hostage-taking has been

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¹ D. YANKOLOVICH, *NEW RULES* 39 (1981).

² The best of these is a note by Mattson, 54 *NOTRE DAME LAW* 131, 148 (1978).

³ Hostage-taking really came to prominence as an international phenomenon in the late 1960's. A great many kidnappings of diplomats in Latin America, and a systematic interference with air transport by Arab nationalists seeking the liberation of Palestine quickly generated imitation that focussed the attention of the world community upon the problem. The catalytic event that gave impetus to law enforcement responses in an organized, systematic way was the seizure by Arab nationalists, believed to have been of the Black September

rediscovered and put to new and highly dramatic uses. It is the consequences of these metamorphic uses of hostage-taking that is the primary concern of this article. This article takes a necessary look at the progress that has been made to date. The subject of hostage-taking is one that will need constant monitoring and a more penetrating view of some of its aspects than is possible here. What can be said, at this stage, is that the world is seeing an intriguing new area of international law in the making. The direction of this new area of international law is by no means clear. Nonetheless, it is interesting and exciting to be present at its birth.

Hostage-taking has become essentially a relatively new form of criminal activity, international in scope and dimensions. The use of the word "criminal" is deliberate and pointed; it is intended to reflect the changing attitudes towards hostage-taking that are crystalizing today. Formerly, the taking of hostages was almost inevitable under certain circumstances and therefore, it acquired at least quasi-recognition as an institution in the Law of Nations, and it became an accepted and disagreeable part of the Law of War.⁴ Today, however, there is almost universal condemnation⁵ of hostage-taking as a barbarous, uncivilized, criminal act.

The legal and practical solutions to the problems raised by hostage-

Group, of the Israeli athletes at the Munich Olympic Games on September 5, 1972. Seventeen persons were killed during the 23-hour drama, including five of the hostage-takers. This was truly a landmark event in this history of this subject, and has been appropriately recognized. "In front of Connollystrasse 31 there is a granite plaque, decorated with flowers, commemorating the murder of the Israeli athletes there in September 1972." Gay, *Musings in Munich*, AM. SCHOLAR 48 (Winter 1974-75). Most of the relevant literature on hostage-taking dates from the early 1970's.

⁴ "The practice of taking or exchanging hostages is an ancient one and was originally 'a means of insuring the execution of treaties, armistices, and other agreements' or a punishment or reprisal." Mattson, *supra* note 2, at 133, citing J.W. Garner & Georg Schwarzenber. This usage persists in our times. Following the cessation of hostilities in the Falkland Islands in 1982, a number of Argentinean servicemen continued to be held by the British to guarantee the armistice. The continued holding of Lech Walesa by the Polish authorities may properly be construed as analogous to a hostage situation designed to ensure compliance of the Solidarity Movement with the law. Presumably, in the view of those authorities, Walesa is not an "innocent" hostage.

⁵ The reservation expressed here must be regarded as well-founded by reference to the U.N. debates on the General Assembly Resolution 31/103 of December 15, 1976 for Drafting of an International Convention Against the Taking of Hostages. On this, see Verwey, *The International Hostages Convention & National Liberation Movements*, 75 AM. J. INT'L. L. 69, 92 (1981). While "recognizing that the taking of hostages is an act which endangers human lives and violates human dignity," and that "international law prohibited the taking of hostages," a number of delegates sought to introduce the concept of the "innocent" hostage, presumably by contrast with those who deserved to have their lives endangered and their dignity violated because they were "guilty." For the pertinent documentation, see CONTROL OF TERRORISM: INTERNATIONAL DOCUMENTS (Y. Alexander, M. Brownz, and A. Nares eds. 1979).

taking are uncertain. There have been many brave words, but few really resolute actions in the world of law to match them.⁶ If the beneficiary of this indecisiveness has been the hostage-taker, then certainly the loser has been the hostage. There has been, however, a continuing juristic movement towards the legal regulation of war as a means of protecting civilians from some of the horrors of war.⁷ The world human rights movement is a vivid example of the recognition by advanced thinkers of the need to reduce, in legal and practical fashion, a little of man's inhumanity towards man.⁸ Similarly, the plight of the hostage is now beginning to catch up with these better established trends; there has been a lag of many centuries between the recognition of the human rights of prisoners taken and held as trophies or items of war and the recognition of the same rights to hostages taken in the 20th century for other reasons.⁹

II. TERMINOLOGY

Before discussing the various issues addressed in this article it is necessary to take a hard look at some of the semantic implications raised by hostage-taking. The term hostage-taking has recently acquired some concrete, legal significance. However, it is far from being a legal term of art. This has remained curiously unremarked; almost as though a definition were quite unimportant since both the conventional and legal meanings of the term are notorious and therefore require no statement. There is, however, much room for linguistic confusion here, and what progress there has been towards clarification has been made in the area of international law rather than domestic law.¹⁰

⁶ The distinction is neatly pointed up by the following observation: "But the limitations of international law alone are sadly reflected in the fact that the U.N. General Assembly, at the very height of the Iranian hostage crisis, was engaged in approving a new International Convention against the Taking of Hostages, with the full participation of the delegation of Iran." Legault, *Hostage-Taking and Diplomatic Immunity*, 11 MANTOBA L. J. 359, 365 (1981).

⁷ The position of the prisoner of war was, at one time, at least as precarious and unregulated as that of today's hostage. "Historically, law had little influence on the treatment of prisoners of war. For centuries, prisoners not sold into slavery or held for ransom were killed." Zillman, *Political Uses of Prisoners of War*, ARIZ. ST. L.J. 237, 238-9 (1975).

⁸ See McDougal, Lasswell & Chen, *Human Rights & World Public Order: Human Rights in Comprehensive Context*, 72 NW. U.L. REV. 227-307 (1977). See also Nanda, *Progress Report on the United Nations Attempt to Draft an International Convention Against the Taking of Hostages*, 6 OHIO N.U.L. REV. 89-98 (1979).

⁹ It has been acutely observed: "Even in time of War, when power struggle marks its greatest intensity, it has long been a basic expectation of Man that there are limits to allowable death and suffering and that certain normative protections are peremptory." Paust, *A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment, & Cooperative Action*, 5 GA. J. INT'L & COMP. L. 431-435 n.17 (1975).

¹⁰ The pertinent international documents are remarkably free from ambiguity when

The term hostage-taking did not originate in a legal context, but was adopted somewhat uncritically from its lay usage. The elements of hostage-taking have rarely been given any critical definition and the term continues to be used indifferently to describe a number of highly disparate states of affairs.¹¹ In short, the lay meaning of hostage-taking has never acquired any real degree of precision and the vagaries in its application have been carried over, almost unconsciously, into legal usage.

The principal problem is in the interchangeable employment of the words hostage-taking and kidnapping.¹² Indeed, especially in the domestic law of the United States, the two terms are in danger of becoming dangerously and inextricably intertwined. From the point of view of criminal policy, separation is clearly desirable. There is a tendency, to treat the act of hostage-taking as a mere element of the crime of kidnapping rather than a distinct genus of offense with its own constituent, characteristic components.¹³ This tends to broaden and diffuse the essential notion of kidnapping; a term having its own long and traceable history in our jurisprudence.¹⁴ This uncritical incorporation of the term hostage-taking has not only altered the criminal concept of kidnapping, but it has also crippled attempts to erect the act of hostage-taking into an autonomous crime under U.S. law. This has occurred at a time when such a

they speak of "hostages." See, e.g., U.N. Doc. A/AC 188/L3. It is clear, however, that the "act of taking hostages" is capable of embracing the crime of kidnapping. That latter term is sensibly omitted.

¹¹ See Mickolus, *Negotiating for Hostages: A Policy Dilemma*, 19 ORBIS 1309, 1310 (Winter 1976). "Kidnapping is by far the most prevalent hostage incident . . .". Clarence J. Mann points out: "By stark contrast, only 118 hostage cases were reported to the FBI during the entire first six months of 1976." For statistical purposes, these hostage incidents include not only conventional kidnappings but also cases in which, for instance, a bank teller is abducted by robbers to support their escape. *Personal & Property of Transnational Operations*, in *LEGAL ASPECTS OF INTERNATIONAL TERRORISM* 42 (A. Evans & J. Murphy eds. 1978).

¹² It has been correctly pointed out that: "In the United States, several state courts require that in order for there to be a kidnapping, there must be movement of the victim that has significance independent of the original assault. A barricade and hostage incident in which the hostage is not moved an appreciable distance therefore might not qualify as a kidnapping." Kaye, *The United Nations Effort to Draft a Convention on the Taking of Hostages*, 27 AM. U.L. REV. 433, 444 (1978). See also Caplan, *Some Other Faces of Kidnapping*, 11 U. Md. L.F. 109, 112 (1972), citing the Chessman case where the victim was dragged twenty-two feet from her car to the roadside and the kidnapping conviction was upheld.

¹³ See Slaughter, *Criminal Law—Kidnapping in North Carolina - A Statutory Definition for the Offense*, 12 WAKE FOREST L. REV. 434, 447 (1976). Note in particular the wording of the North Carolina definition at page 437 and the intertwining of the concepts of kidnapping and hostage-taking. This definition is the product of relatively recent learning and concerns.

¹⁴ See *Gooch v. United States*, 82 F.2d 534, 537 (10th Cir. 1936), citing *State v. Harrison*, 145 N.C. 408: "The word 'kidnap' has a technical meaning. It is derived from the common law, and must be interpreted according to its technical meaning at common law."

distinction is achieving a measure of recognition in international law. It may already be too late to arrest this development, but it is one that should not escape the attention of the careful commentator. For the purposes of this article, a *hostage* is any victim of a *hostage-taking, skyjacking, or kidnapping*. It is unimportant for the purposes of this article whether or not the hostage is technically accorded that status by reference to some country's domestic law or whether the status of the victim, and accordingly, the rights that flow from that status, may be more precisely defined. The present work is based, therefore, on a *de facto*, stylized definition of a hostage rather than its definition in either legal or common parlance. While the *de facto* definition is clearly unsatisfactory, it is probably the best definition, given the present state of the matter; refinement must be the work of others, who may have the advantage of more uniform descriptions and understanding of the nature of the problem. Presently, all that is necessary is a class of victims sharing a common plight.

Some attention to what is meant within this article by the term rights is necessary. Clearly, rights is another elastic term capable of different interpretations according to the context and sense in which it is used. Moreover, it is a word which legal scholars have given much consideration, both from the point of view of its meaning and of its application in different legal settings; like *hostage-taking*, rights is also a word capable of being invested with a broader lay meaning than its legal counterpart.

It is argued that under the civil law system, the meaning and extent of an individual's rights cannot be estimated from a mere reading of the law. A person's rights are shaped, extended or contracted, and given meaning and value by those who have the authority to recognize a claim and provide its remedy.¹⁵ The locus of that authority will vary from system to system and a concrete statement of an individual's rights in any particular instance will depend upon the specialized knowledge of the workings of that legal system.¹⁶

The international criminality of *hostage-taking* must be recognized. The failure to do so means that *hostage-rights* vary in substance and quantity depending upon the jurisdiction in which the drama is played

¹⁵ It must be asked, realistically, what prospects of recovery there might have been if those held hostage in the U.S. Embassy in Tehran had brought suit in the Iranian courts, even if there had been no Agreement barring them from so doing. What rights might have been practically asserted in the courts of Idi Amin's Uganda by those forcibly detained at Entebbe as a result of having been skyjacked by a group of international terrorists to that country?

¹⁶ In the context of becoming a victim as a result of some unlawful interference with international aviation, these complex matters are well canvassed by Neil R. McGilchrist, *Aerial Hijacking*, 2 LLOYD MERC. COMM. L.Q. 298-304 (1978).

out. Thus, a hostage's rights may be greater in London than in Beirut. Moreover, a hostage's rights may differ quite widely according to where he is victimized within the United States. This gives the subject its peculiar piquancy for the legal practitioner.

Professor Henkin has stated, "By 'human rights' I mean simply those moral political claims which, by contemporary consensus, every human being has or is deemed to have upon his society and government."¹⁷ The nature of a right as a claim upon somebody is the important concept. The substance and boundaries of that claim are determined by how effectively it can be upheld by those having the powers and authority to give it form and reality.

Hostage-rights must be viewed in a similar light. The claims arising under hostage-rights are for the most part as acceptable as the claims arising under human rights. Their translation into something of real value to those in whom they are deemed to inhere is a matter of more than mere statement; it demands an exercise of power and authority.¹⁸ This article will demonstrate that a hostage's rights, in any given case, are what a hostage might realistically expect from an acknowledgement of his claims by the appropriate state organ in the particular circumstances and at a particular point in time.

The process by which a hostage's claims may be converted into rights may be regarded as having two stages. In the first stage, the claim is formally recognized as a right by a governmental body, usually a court, to which the task is entrusted. In the second stage, practical effect is given to that recognition by an executive organ of the state so that the right is invested with substance. In any particular case, the process can be subjected to examination to determine how far, if at all, the transformation from claim to right has progressed. In some instances, claims will be in the process of transformation since they have not yet reached the status of full-fledged rights. In others, the process is clearly complete, although the machinery for enforcement of the remedy may be ineffective. The recognition of rights is important, even where they cannot be effectively upheld or are consistently abused.¹⁹ Rights are a yardstick against which

¹⁷ Henkin, *Rights: American & Human*, 79 COL. L. REV. 405 (1979).

¹⁸ A contemporary novelist, who has written a great deal on terrorism makes the distinction well. "Power implies that we can accomplish what we plan. Authority signifies only that we may order it to be accomplished." M. WEST, *THE CLOWNS OF GOD* (1981). The distinction is far from academic, as witness the relative positions of a hijacked aircraft pilot and the ground authorities trying to manage the crisis.

¹⁹ A comparison may be made with the case of rape. The improvement, in recent years, of the treatment accorded the victims of rape, by those charged with administering the law in the United States is notable. There has not been a formal extension of the rights of the rape victim, so much as a growing awareness of the obligations owed to the victim in the matter of just, rather than sympathetic, treatment.

human conduct can be measured.

III. RELATIVE VALUE OF RIGHTS

All rights do not have the same value; some are more valuable than others, both to the system that recognizes and protects them and to the individual who is the beneficiary of that process. It follows then that rights are susceptible to the effects of competition both by reason of their rankings and priorities, and the fact that rights are deemed to attach to different subjects of the law. Accordingly, rights are sometimes in conflict and the system must then decide which right shall prevail. However, neither recognition nor protection of rights is enough. Some rights will be upheld while others will be denied when the law cannot reconcile the clash of rights in a competitive situation.

There is no world-wide unanimity on the relative importance of rights. Rights receive their rankings and are upheld according to a variety of meta-legal and extra-legal considerations that differ from system to system and age to age. Currently, it is argued that the greatest human right is the right to life.

Taking the right to life as the apex of the system, a descending order of rights can be constructed. However this construction is done, it is certain that disagreements about ranking, and listing of rights will increase and grow sharper as the descent continues; there is more competition between rights at the bottom of the list than there is at the top. Nonetheless, whatever rights we assign to hostages, by reference to any particular legal system at any point in time, must be situated within this artificial, hierarchical construct.

This structure cannot deal with rights as mere abstractions; a right that cannot be upheld in some practical fashion must be accounted as no right at all. Likewise, no account of hostage-rights can fail to take into consideration that in both the legal and the practical sense, *all hostages are equal, but some are clearly more equal than others*. The political, professional or societal status of a person largely determines the extent and practical validity of his rights as a hostage.²⁰ Similarly, a person's

²⁰ This may be a distressing point for those concerned with the establishment and maintenance of Equal Rights under the Law, but it must be realistically faced. Hostage-taking is a game of power. If the hostage seized is of sufficient importance to the power structure affected by the event, greater efforts will be made by the authorities to secure his release than might be expected were the victim of slight importance. This sensible premise orients hostage-taking by political extremists, prompting the seizure of prominent public figures such as Hanns Martin Schleyer or Aldo Moro rather than some unknown, presumably, in theory, entitled to the same rights as a hostage. What those in authority actually do in these cases is much more revealing of the measure of hostage rights than what the law might say.

status largely determines why he was taken as a hostage.

IV. CONFLICT OF RIGHTS AND OBLIGATIONS

Central to the subject of this article is the concept of the collision or conflict of rights. A hostage's rights, at any particular place and time, are capable of being moved up or down the scale. This is no more capricious than what might befall anyone with a claim he is seeking to assert at law. However, the drama of the hostage's plight tends to accentuate the incongruities. It is, perhaps, better to view what is being examined here in terms of legally protected interests²¹ rather than rights; at least until the conflict is resolved. Thus rather than assert that every person has a right not to be taken hostage, it is more expedient to state that every person has an expectation or an interest in remaining free from that harm.²² If that expectation is not met, certain consequences flow from it. Essentially, the concern is the effect, from the hostage's perspective, of those consequences. It must be recognized that, given the state of the world today, almost anyone might be victimized by hostage-taking. Some people will, by reason of personal and circumstantial factors, run a much higher risk than others of being taken and held hostage. Having thus recognized that one's location determines the degree of risk to which one is exposed, it is useful to define in the most general of terms, the legitimate interests, expectations, or claims of a hostage. These interests may be divided into two parts by reference to the hostage-taking event itself. In the first instance, people have an interest in not being taken or held hostage. They have a claim upon society or government that appropriate measures be taken to prevent this traumatic experience from happening to them.²³ In addition, assuming that prevention fails and a hostage-taking occurs, the victim has an interest, expectation or claim to recover his liberty as quickly as possible without suffering any physical, psychological, economical or other harm in the process. The potential conflict of other rights, endangered or interfered with by this disruptive event, is even more

²¹ Compare Fletcher, *The Right to Life*, 13 GA. L. REV. 1371 (1979).

²² Special obligations may arise out of these expectations. The principle is most clearly spelled out in the airline cases. See *Terrorism in the Terminal: Airline Liability under Article 17 of the Warsaw Convention*, 52 N.Y.U.L.REV. 283, 305 (1977). "Hijacking and airplane sabotage are modern examples of inherent aviation risks, because aircraft operation is a 'prerequisite for these acts.'" *Id.* at 300-01.

²³ Stated in such wide terms, the subject appears daunting. But any examination of hostage-rights must pose this as the first step, and then proceed to a minute and detailed exploration of the preventive measures. It is in this process that all the latent conflicts and anomalies begin to surface for what is "appropriate" means much more than merely what is practical. Law is beginning to evolve, or is being made, around this question. If the term "rights" is to have any sensible meaning in the present context, the implications of what is involved have to be squarely faced.

pressing and acute than in the pre-hostage-taking phase.

To state that an individual has rights necessarily involves a consideration of the obligations imposed upon others by any recognition and upholding of the rights. In other words, a right is a justified claim to stand in a certain relationship with some other person(s) such that that other has an obligation correlative to the right. The claim is that a person has an obligation to do or not do some particular thing.²⁴ Therefore, hostage-rights may be equally expressed in terms of the obligations of others towards the hostage. Indeed, given the general utility of such an approach, it is better, perhaps, to seek precision in the matter of hostage-rights through an examination of the obligations and how well or poorly they are discharged.

Different obligations are owed to the hostage by different people; just as there is a hierarchy of rights, there is also a carefully graduated scale of obligations. This is the most interesting and controversial part of the exercise. For a curious, practical incongruity begins to emerge that, in a very real sense, distorts the whole picture of hostage-rights. Whatever the theoretical state of affairs might be, the recognition of rights does not match up with the discharge of the corresponding obligations. This is not due to a mechanical malfunctioning of the system. Rather is it due to a perception of rights and obligations not as correlates, or jural opposites in the Hohfeldian sense,²⁵ but as free-floating concepts, detached, or at best, connected to something other than one another. There is a certain sophistry, if not quite patent insincerity, about all this. It is as though there were a grudging recognition of values without acceptance of the obligation to protect them appropriately.

Consideration of the extreme case serves to highlight the incongruity. It is often asserted as a matter of policy, if not of strict law, that the life of the hostage is of the highest value and thus, it is deserving of protection in a civilized society.²⁶ No other value is seen as superior to or commensurate with this one. Accordingly, in judging the place of the hostage's rights in any theoretical hierarchy, due weight must be placed upon the value of the hostage's life. All other values, in the construction of any system of rights and obligations ought therefore to accede to the process of giving effect to the supreme worth of the human life at stake in the hostage-taking drama. Certainly, property must be accorded a lesser

²⁴ Pilon, *Ordering Rights Consistently: Or What We Do & Do Not Have Rights To*, 13 GA. L. REV. 1171, 1176 (1979).

²⁵ Hohfeld, *Some Fundamental Legal Conceptions as Applied to Legal Reasoning*, 23 YALE L.J. 16-59 (1913).

²⁶ The most authoritative U.S. expression of this is to be found in DISORDERS & TERRORISM: REPORT OF THE TASK FORCE ON DISORDERS & TERRORISM 29 (1976). "The standards and goals offered in this report are based firmly upon the primacy of the value of human life over all other values, concrete or abstract." *Id.* at 29.

value than human life; property, however valuable, can always be replaced or replenished in cash or in kind, while human life is irreplaceable.²⁷ Given this conflict of interests, it seems that there can be no doubt which ought to prevail. But the matter is far from being that simple. If it were that simple, no sum of money would be too high to ransom the life of a single hostage, however humble his station in society.²⁸ History and experience illustrate that this ideal does not fit the facts. This is easily demonstrated by pushing the matter to absurdity. What is an individual worth in monetary terms? One million, ten million, one hundred million, four hundred million?²⁹ How high need one go before the absurdity causes one to say "Stop!" Yet, it is accepted that human life is worth more than mere money. The source of the anomaly suggests itself when the enquiry whose money is made.³⁰

V. WHOSE OBLIGATION?

Viewed in this light, the issue of hostage-rights is reduced to the question of who owes what to whom? Much of the uncertainty over the character and extent of hostage-rights is due to the lack of precise definition of the different obligations. Presently, we must stick to generalities, but the scheme for examination can be set out with some exactitude. Obligations towards the hostage, as well as those owed to potential hostages are owed in a *private* or an *official* capacity. Generally, a hostage's rights consist of certain claims against society, or against a government. The

²⁷ A poignant expression of this sentiment comes from a speech of one who is no stranger to property values, Paul Mellon. "[Someone] quotes the sculptor Giacometti as having said, 'If a house were on fire and I could take out a Leonardo or a cat, I would rescue the cat. And then I would let it go'. It is life itself that counts." B. Hersh, *THE MELLON FAMILY* 532 (1979).

²⁸ A study of monetary settlements actually made in hostage (especially kidnapping) cases quickly establishes that while all animals are equal, some animals are more equal than others. It is evident that a bank president is worth more, in terms of a ransom, than a bank teller. For some interesting insights into the human, as well as the financial aspects of assessing the worth of a kidnap victim, see C. PEPPER, *KIDNAPPED: 17 DAYS OF TERROR* (1978).

²⁹ This is close to the figure demanded for the release of each of the remaining 53 U.S. hostages in Iran. This event has spawned a great deal of literature deserving of the closest study by all interested in the subject of hostage rights. The legal aftermath of this event will be felt for years. It has been well said that, "[I]t appears that the real trade was foreign Iranian assets for the hostages." Janis, *The Role of the International Court in the Hostages Crisis*, 13 *CONN. L. REV.* 263, 276 (1981).

³⁰ It is not always a matter of money at stake, even where non-governmental entities are concerned. An American bible translator, Chester Bitterman was kidnapped by M-19 terrorists in Bogota, Colombia on January 19, 1981 in an attempt to force the U.S.-based Summer Institute of Linguistics to leave the country. Bitterman, aged 28, was killed by his captors 48 days after his abduction when the missionary group refused to meet the demand. See *The Dallas Morning News*, March 8, 1981, at 16A.

obligations served by those rights are, however, discharged not by such nebulous entities, but by identifiable human agents. These individuals decide to accord the rights their recognition, to take concrete actions such as paying, or refusing to pay ransom and, above all, to carry out the supremely difficult task of assigning the rights their respective places in the hierarchy. In the rather lofty talk that so often attends the questions, it is easy to overlook the role played by human beings, with all their prejudices, fears, aspirations, and self-interest.³¹ Small wonder then, on this account alone, that there should be such variations in defining, recognizing and enforcing hostage-rights. Perhaps, the degree of consensus that has emerged in this area is more remarkable than the differences of philosophy and practical approach.

In legal terms, from the perspective of who owes what to whom, it is important to perceive and maintain the distinctions, even where the distinctions are manifestly based upon fictions. In some cases, for example, only a government can decide and act. This is the case where the hostage-taker makes release of the hostage contingent upon the release of some person or persons in government custody. Sovereign immunity may constitute an absolute bar to any examination of what is actually decided in that government's name. In other cases, where a hostage proceeds against some entity to secure redress of his rights at law, it may be inconvenient to proceed against the human agent of the entity since the entity is better able to satisfy a judgment awarded against it. In this instance the official *persona* of the human agent must be taken into account, while maintaining the legal figure of an independent entity, clothed with all the necessary authority and attributes to give effect to the obligations the hostage expects to see discharged in his favor. In practice this consideration is far from being as easy an exercise as it might seem in theory.

Chief executives of states and servants of those chief executives can be viewed as owing official obligations to hostages. Thus, it will be necessary to examine the precise nature of those obligations as they are emerging in domestic and international law. Whether or not such individuals are personally liable, is usually a matter of little consequence either to the hostage or to the theories being propounded here, for it is the exercise of the *official* capacities that are in issue. It is, however, a very real matter

³¹ President Carter must bear a heavy, personal responsibility for the decision to mount, in April, 1980, the military rescue mission that failed in its purpose to release the U.S. hostages held in Iran. He had said, on December 7, 1979: "I am not going to take any military action that would cause bloodshed or arouse the unstable captors of our hostages to attack them or to punish them. . . ." 80 DEP'T ST. BULL. 55, No. 2034, (1980). The world has yet to hear a satisfactory explanation for the *volte face* that cost the lives of American servicemen attempting the rescue. For an interesting review of its closest precedent, see Friedlander, *The Mayaguez in Retrospect: Humanitarian Intervention or Showing the Flag?*, 22 St. Louis U.L.J. 601-13 (1978).

that the exercise of those capacities is largely shaped and controlled by the attributes of the private rather than the public figure. The scope for caprice is enormous and at times, the rights of hostages seem almost to rest upon the whim of a single individual.³² But, for the most part, such situations are aberrations. Law and policy tend to institutionalize themselves to a remarkable degree.

It has been pointed out that, "An individual human being is only a useful social myth. We achieve humanness only in and through our relationship with others. We exist through our attachments."³³ Hostage-rights and the obligations owed by others to the hostage are the juristic product of those attachments. Rights are defined by relationships. How an individual stands at law in relation to another individual defines both what he is owed and the capacity in which one bears the obligation towards him. Thus, to state with precision the range and extent of someone's rights under a particular system of laws involves a minute examination of his relationship with those with whom he interacts.

The status and relationships of even the most accidental of hostages will be material in determining his rights, and thus, what he is owed by individuals and the community at large through its agents. A host government may owe more to an accredited diplomatic representative than a tourist taken hostage within the ambit of its protection.³⁴ It may owe more to strangers than to its own nationals.³⁵ A corporation may owe special obligations to an employee taken hostage or some other relationship may impose on it an obligation of an equally onerous nature to a relative stranger.³⁶ In the practical sense, the view of hostage-rights as measured

³² That individual will usually receive advice, even though he may not heed it. An interesting background anecdote is recounted by Alfred P. Rubin that is revealing of prevailing sentiment at the time the case of the U.S. Hostages was to be referred to the I.C.J. The objection that came most cogently from academics and officials alike was a feeling that military operations, "if successful, would not only free the hostages but teach a needed 'lesson' to the Iranian leaders responsible for the outrage." *The Hostages: The United States & Iran*, 82 Y.B. WORLD AFF. 213, 223 (1982).

³³ W. GAYLIN, *THE KILLING OF BONNIE GARLAND: A QUESTION OF JUSTICE* 348 (1982).

³⁴ Over the years, the proposition that an especially high duty of care should be imposed with regard to the protection of persons having special international status has been recognized. Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 232 (1977). This is, incidentally, a most important article in the present topic area.

³⁵ This is certainly the case if the strangers fall within the class of specially protected persons recognized by international law. *Id.*

³⁶ A good example of this is furnished by those companies, the business of which is the international carriage of persons by air, and the regulation of liabilities under various international conventions. It is no accident that much of the firm law concerning hostage rights is to be found in cases arising out of incidents of international air piracy. See Tompkins, *The Aftermath of a Hijacking-Passenger Claims & Insurance*, 39 J. AIR L. & COMM. 381-98 (1973).

in terms of "who owes what to whom" is hardly sufficient. It is necessary to have some means of ascertaining not only the obligation in those terms, but also the mechanisms whereby what is owed can be demanded and satisfied. Furthermore, the tremendous variations in hostage-rights across the world necessitates more than an affirmative answer to the question, does the rule of law prevail in the jurisdiction where the hostage asserts his rights? It is also necessary to know whether that jurisdiction has, for example, a developed law of contract or torts compatible with other developed systems and an incorporation of international law. This inquiry is crucial to enforcement and procedural mechanisms, for only then can an investigation of how the law is applied occur.

Defining hostage-rights is an arduous enough task in the abstract. In real life, it may be so daunting that those involved, including the hostage, are prepared to settle for something much less. That the rights of hostages cannot be defined or upheld with the precision demanded by 19th Century German legal theorists is not an indication of present-day sloppiness nor of an absence of real rights. Rather, it is a recognition of the fallacies of the world. The limits of hostage-rights are the limits of the possible.

VI. INDIVIDUAL OBLIGATIONS TO HOSTAGES

The obligations owed to hostages by individuals in a private capacity are similarly defined by relationships. While these relationships are generally simple, the whole subject of private obligations to hostages has, for a variety of reasons, commanded much less attention. Consequently, the issues are as cloudy, if not cloudier, than they are in the public sphere. This is an area in which speculation must substitute for legal description of rights since the matters to be raised have not, to a large extent, been tested. Many of the rights claimed by hostages against private individuals must be measured against the rights of those private individuals. There is a critical competition of rights that serves to define what is owed to the hostage and its position in the normative hierarchy.

Perhaps the most important individual with whom the hostage is in a relationship is the hostage-taker.³⁷ For this reason, the relationship and

³⁷ While as a practical matter, the hostage cannot enforce any rights against his captor(s) during this ordeal, their attitude towards him, and his rights, is critical to his survival. Thus William Niehous, held captive by political extremists in Venezuela for 3-½ years, stated: "My guards - from the first day - had told me that they would not kill me. Neither would they let me starve. If I failed to eat, they said, it would only make me uncomfortable and be bad for my health. They promised to keep me alive, even if they had to feed me intravenously." *Hostage Survival - a Firsthand Look*, SECURITY MGMT. 6-10, 49-53 (1979). Such consideration is unusual and undoubtedly contributed, in large measure, to the victim's survival.

its effects upon the rights of the parties deserves to be scrutinized with care. Against the hostage-taker, his victim asserts the fundamental right of the highest legal and practical importance, namely, the right of self-defense. The utility of this right will vary greatly from case to case; it has little value for one bound, gagged, and helpless in the black fastnesses of some undiscovered "people's prison." Its importance, however, is far from academic even under the worst conditions. The hostage *in extremis* has no one to rely upon for survival except himself.³⁸ Most people would do anything to survive. Their rights define and circumscribe the anything that they might have to do to effect their survival. Yet, even the right of self-defense does not automatically override all other rights.

The right of self-defense is not all-encompassing and, in fact, under some legal systems it may be narrowly defined.³⁹ The exercise of this right, both against the hostage-taker directly and in relation to the rights of others, must be in conformity with the law. A hostage does not have an unrestricted right to kill the hostage-taker. Accordingly, he must proceed with due caution in the exercise of his limited right of self-defense where his right impinges upon or derogates from the rights of others. This is particularly important in multiple hostage-takings where an intemperate exercise of the right of self-defense by one hostage might place in jeopardy the lives of other hostages. This topic will be discussed later in this article.

More difficult to assess is the obligation of those who are neutral, or even sympathetic to the plight of the hostage, yet whose own interest in the matter generates rights in conflict with those asserted by the hostage. In recent years, the issues have been posed in critical, antagonistic form by the Fourth Estate, the mass media.⁴⁰ By all accounts, the influence of

³⁸ How, as a practical matter, individual hostages cope is an interesting subject of study. Many turn to religion for guidance and comfort. See, e.g., K&D DORTZBACH, *KIDNAPPED* (1975); and C. FLY, *NO HOPE BUT GOD* (1973). Dr. Fly writes:

And so it appeared that all outside efforts had failed - except prayer! It became more and more evident, as Miriam & John told me of their experiences and showed me clippings, cables, and letters, that only God's mercy could be credited with my rescue from almost certain death as the final consequences of this ordeal. *Id.* at 143.

³⁹ Perhaps the most extensive and penetrating treatment of the individual rights of self-defense, in all their aspects, is that essayed by the great Spanish jurist, L. JIMÉNEZ DE ASÚA, *TRATADO DE DERECHO PENAL* Vols. IV, V, & VI (1952). In general, it may be said, the more developed the legal system, the more inclined are those acting under its authority to inquire into the state of mind of those claiming to have acted in self-defense. Yet even some of the most developed systems, such as that of Switzerland, have very narrow and conservative interpretations of the self-defense concept.

⁴⁰ The taking of a hostage or hostages is often a highly newsworthy event. It is perfectly comprehensible that those who are in the business of newsgathering and news dissemination should be concerned with it. What is most usually complained of is the intrusive nature of

the media upon terroristic events generally is considerable.⁴¹ The effect of modern means of electronic newsgathering is very intensive; the media has become a part of its own show. In hostage-takings, the presence of the media, however restrained and low-key, has the potential of seriously derogating from the primary interest of the hostage in surviving the ordeal.⁴² The public-newsworthy character of these events cannot be denied. But newsgathering, particularly television and radio broadcasting, may cause harm to the hostage in a most direct fashion. There is, perhaps, no place where the right of free expression is more vigorously asserted, or more jealously guarded than the United States.

The following observation made in connection with a dramatic, highly newsworthy hostage-taking clearly points out the dangers of unfettered free expression. "Now we had a severe conscience qualm," said Darrell Christian, an AP newsman. "What if we ran the story (that the immunity offer might be a ruse), Kiritsis hears it on TV and blows Hall's head off?"⁴³ Hostage-takings are tense, volatile situations in which the perpe-

the activities involved and their potential for causing harm in a delicately poised situation. The thirst for news certainly reaches ghoulis proportions at times and little thought seems to be given to the interests and feelings of the immediate victims and those most closely concerned with their safety. The conduct of the press, in connection with the dreaded Legionnaires' Disease is graphically told in G. THOMAS & M. MORGAN-WILLS, *ANATOMY OF AN EPIDEMIC* (1982). The justification offered by one reporter is given in the following terms: "People are dying out there. Our readers have a right to know. It's our job to tell them." *Id.* at 155. There is an important competition of interests here that must be noted.

⁴¹ See Cooper, *Terrorism and the Media*, 24 *CHITTY'S L.J.* 226 (1976). Very little hard data is available. A pioneer in this field, Neil Hickey, has said: "Very little study has been expended upon the relationship between terrorism and the media. When I was researching a series on that subject for my magazine, I had the uncomfortable feeling that I was hacking a trail where none existed." Proceedings of the John Bassett Moore Society of International Law, *International Terrorism: Targets-Responses and the Rule of Law* 6 (A. Dunn ed. 1979).

Understandably, government funding for serious studies in this area is inhibited by the desire to be held free from even the suggestion of interference with the traditional freedom of the press. The media industry, itself, has shown commendable professional concern about the problem but this has generated little real research of the kind needed to produce hard data.

⁴² It has been asserted that: "No innocent victims, hostage-takers or terrorists are known to have died as a direct result of actions by the American journalists." Jaehnig, *Journalists and Terrorism: Captives of the Libertarian Tradition*, 53 *IND. L.J.* 717, 721 (1978). However, it has been pointed out:

There was in the Hanafi seige a point where news coverage enraged the hostage-taker, this time a report of WTOP (AM) early in the seige which called the terrorists "Black Muslims." Khaalil, incensed at being mistaken for those he thought responsible for the murder of his family, called the station demanding an immediate apology or 'I'm going to kill someone and throw him out the window.'

Terry, *Television and Terrorism: Professionalism not Quite the Answer*, 53 *IND. L.J.* 745, 754 (1978).

⁴³ Jaehnig, *supra* note 42, at 717.

trator is often intensely fearful and suspicious. The hostage's life hangs by a thread, in Hall's case,⁴⁴ literally by a wire. The last thing the victim wants is some third party, under any assumed color of right, jerking that wire. Metaphorically speaking, that is what the representatives of the media potentially do every time they intervene in a hostage situation.⁴⁵ This competition of rights does not necessarily end with the termination of the hostage-taking event. There are human interest aspects of the story that carry over and can be expected to form the basis of other media presentations, representations, and misrepresentations on their own account.⁴⁶ Where does the right to the story end and the hostage's right to be free from unwanted intrusions upon privacy begin?⁴⁷ This also is an area of developing law and practice with a substantial potential for conflict before matters are resolved.⁴⁸

⁴⁴ Richard Hall was taken hostage on February 8, 1977 by an Indiana property developer, Anthony G. Kiritsis. With a shotgun wired to his neck, he was marched by his captor, in severe winter weather, through the streets of downtown Indianapolis. The spectacle produced some of the most dramatic photographs of a hostage incident ever taken in the United States. Much of Hall's long, uncertain ordeal was on live television, for the benefit of all save the victim.

⁴⁵ Journalistic enterprise and zeal in using the telephone to communicate with hostage-takers has led some law enforcement authorities to seek legislation to enable them to secure exclusive control of the telephone lines in these cases. The practice of journalists tying up the lines in this way is irresponsible and dangerous. "One psychologist traced many of his negotiating problems to the effects of phone interviews upon Khalis and his followers." Terry, *supra* note 42 at 757.

⁴⁶ The leading case is *Time, Inc. v. Hill*, 385 U.S. 374 (1967), where a very disagreeable, real-life experience was later translated into a stylized version that was the subject of the action. See generally Miller, *Our Right of Privacy Needs Protection from the Press*, 7 HUM. RTS. 16 (1978).

⁴⁷ There is, clearly, a serious competition among very valuable rights and interests here. Much has now been written in this area so far as the law relating to the United States is concerned. See, e.g., Lee, *Privacy Intrusions while Gathering News: An Accommodation of Competing Interests*, 64 IOWA L. REV. 1243 (1979). *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) makes it clear that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." Yet, it would seem difficult for an individual, on privacy grounds, to prevent press intrusion upon a newsworthy event such as a hostage-taking. See generally *Fletcher v. Florida Publishing Co.*, 40 Fla. Supp. 1 (1974). For an especially tense live intrusion that might have had ugly consequences during the Hanafi incident, see *The Washington Post*, March 11, 1977, at B1.

⁴⁸ The great technological advances of recent years in the electronic gathering of news, especially the introduction of the television mini-camera have greatly enhanced the possibilities for dangerous intrusion upon hostage situations at their most critical moments. Nobody can predict, at that critical point in time, how such an intervention is likely to affect the behavior of the hostage-taker. The hostage is exposed, in all this vulnerability, to a huge audience of strangers, who become, thereby, witnesses from afar to his miserable struggles for survival. See E. LESTER, WALLENBERG (1982), where a dramatic photograph is published of a woman slipping away from a group rounded up for the death march. It is not difficult to see how her prospects of survival might have been jeopardized had this dramatic

The foregoing discussion adequately introduced the widely differing positions taken within the law, both international and domestic, on the subject of hostage-rights. The hostage's prospects of surviving an extremely disagreeable and often intensely frightening situation depends largely on what view is taken of his rights and how much respect is accorded them by all the participants in the action. It would be wise to expect little goodwill from the hostage-taker.⁴⁹ He is operating outside the framework of any law. Yet, for a brief moment, his actions are of greater importance than any theoretical statement of rights, for he has the power of life and death over his victim.

Hostage-taking, perhaps more so than any other type of terroristic⁵⁰ activity, is an intolerable affront to regular, legally established authority. It is a challenge that goes directly to the heart of that authority and its exercise. The presumptuousness of a criminal seeking to use the fruits of his on-going unlawful activity to bargain often evokes responses that are visceral rather than reasoned.⁵¹ To regard the hostage-taker, certainly the

moment been captured by the television mini-camera.

⁴⁹ See generally Cooper, *Hostage Negotiations: Options & Alternatives*, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, CTT SERIES 13 (1977), who states:

The hostage-taker cannot really afford to think of the victim as a human being at all. The moment he does, a complex web of relationships starts to develop that is inhibiting to the bargaining process from his point of view. He can only reach the level of *barbarity* necessary to put pressure on those with whom he is negotiating if he can truly think of the hostage as an object rather than as a person. Therefore, from the hostage-taker's point of view, he wants to know as little as possible about his victim, his hopes, his fears, and his relationship to the external world. If he cannot do that, he will seek to interpose political or other considerations as a shield such as "These persons are nothing to us; we are at war."

⁵⁰ Hostage-taking is an activity that is, by its very nature "terroristic," regardless of whether the perpetrator is to be classified as a terrorist, in any of the many senses that overworked word has come to bear, or whether he falls more exactly within some other classification that does not carry that distinctive label with its evident load of opprobrium. It is an activity calculated to terrorize, to instill massive fear in the hostage, the instant victim, for the purpose of coercing those concerned with his safety. Moreover, there is a nakedness of purpose about hostage-taking; what is being done cannot be mistaken for anything else. The fear is directly generated and applied. The motive and purposes of the hostage-taker do little, if anything, to allay the fears of the hostage and these apprehensions are well-founded. Death from a shard of glass held to the throat by some frightened, common criminal is just as final as death administered more surgically by a political extremist using a submachine gun. The arguments commonly employed against the terms "terrorism" and "terrorist" have, therefore, little validity when directed against the adjective "terroristic" as it is used here.

⁵¹ For example, feeling ran very high at times that Iran should be punished, in a most severe, physical way, for holding the U.S. Embassy hostages. Retribution overrode good sense for it was clear that these sentiments were not prompted by a primary desire to rescue the hostages or secure their safety. It is clear, too, that considerations of law scarcely entered into the thinking of those who clamored for a forceful solution to the crisis. "A right to intervene based on realist principles ought to exist." But, "in fact, no right of intervention is

more notorious and arrogant ones, as an outlaw is both tempting and satisfying to some persons. Responses based upon such a creed place the hostage in deadly peril. If the hostage-taker has no inducement to live, he can have none to spare the life of his hostage.⁵² While there are incongruities about this approach that are offensive to many, it is only by striving to keep the hostage-taker within the pale of the law that the vital interests of the hostage can be protected. This uneasy, and often inelegant recognition of the *de facto* power of the hostage-taker translates into responses that preserve some of the individual rights of the hostage at the expense of some of the broader rights of the community.⁵³ The position is not very satisfactory, and constant adjustments are being sought as the historic power shifts occur. There is much grumbling, and an increasing resort to litigation as survivors or their personal representatives seek greater definition of the obligations owed to them under the law. There is an increasing awareness, domestically and in the international community, of the hostage as a person rather than a pawn in an unsavory game between bitter, inconsiderate antagonists.

VII. GOVERNMENTAL RESPONSES TO HOSTAGE-TAKING

*We can all hope for the day when substantive international law will directly oblige individuals to treat fellow human beings with the respect and dignity they rightly deserve. That day has not yet arrived.*⁵⁴

recognized by the majority of states. . . ." Note, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality*, 22 VA. J. INT'L. L. 485, 519 (1981). Of Entebbe, Frederick Hacker writes: "But the sad truth of the matter is that nobody on either side worried too much about any international or other law until after it was all over." F. HACKER, *CRUSADERS, CRIMINALS, CRAZIES* 335 (1976).

⁵² The point was very well made by a criminal defendant, Gary Krist, the kidnapper of Barbara Mackle. "If this jury returns a verdict of death, it would only persuade all other kidnappers never to return the victim alive." G. MILLER & B. MACKLE, *EIGHTY-THREE HOURS TILL DAWN* 393 (1971). It is interesting to note that Spain, which has enacted very severe legislation against terrorism, has recognized this point in its Decreto-Ley of August 26, 1975, on the Prevention of Terrorism. This enactment specifically provides, in the case of hostage-taking, for mitigation of punishment where the perpetrator releases the victim promptly, unconditionally, and unharmed. This is a sound legislative purpose that might profitably be copied elsewhere. It is to be observed that Krist could not have availed himself of such provisions in mitigation for he was not responsible for the victim's release unharmed.

⁵³ It has been well put that: "As in many political bargaining situations the dispute is concerned not simply with actual people or things but also with issues of principle and precedent." Smith, *International Terrorism: A Political Analysis*, 31 Y.B. WORLD AFF. 138, 143-44 (1977). The hostage cannot claim that his immediate predicament requires of the authority in whom the decision-making power is reposed that all other considerations, such as the effect of any action taken on the interests of future hostages, be subordinate to the satisfaction of his own needs.

⁵⁴ D'Zurilla, *Individual Responsibility for Torture under International Law*, 56 TUL. L.

It is scarcely an exaggeration to state that the world was taken by surprise when the Israeli athletes were seized and held hostage at Munich during the Olympic Games in September, 1972. Perhaps no nation at that time was better equipped than the Federal Republic of Germany to respond to the pressures of the event.⁵⁵ Indeed, subsequent experience has shown that few nations are politically, morally, or legally prepared to respond effectively to this form of onslaught upon them and their institutions.⁵⁶ Before 1972, international responses had developed largely under the stimulus of aerial hijacking; a phenomenon then little understood and for which there was much hesitation about how to combat it.⁵⁷ In the turbulent years of the 1970's, there were few qualitative or quantitative advances in the area of small group terrorism.⁵⁸ However, there were enormous strides in the governmental mechanisms for coping with such acts of terrorism. In many cases, brutality was simply faced off against brutality. For example, terrorist movements were most effectively put down in Uruguay and Argentina, but at a great cost in terms of human rights. Hostage-taking, in all its forms, flourished during the past decade and it is perhaps, a fitting commentary⁵⁹ that it should be brought to its end by a hostage-taking that represented an unparalleled challenge to international law.⁵⁹ Few, at the time of Munich, could have envisioned such

Rev. 186, 226 (1981).

⁵⁵ It was, indeed, the stimulus of the Munich tragedy that prompted most countries to examine the adequacies of their own responses and to begin programs designed to remedy the deficiencies found. On the state of police practices, generally, see R. Kobetz, *Hostage Incidents: The New Police Priority*, THE POLICE CHIEF 22, 34-35 (May 1975). Subsequent events, and responses to them, have done little to suggest to informed observers that there has been a great deal of improvement, worldwide, in responses to hostage-taking since the time of the Munich incident. Many of the intangible factors leading to the tragedy at Munich have been simply overlooked. See Kobetz & Cooper, *Hostage Rescue Operations: Teaching the UnTeachable*, THE POLICE CHIEF 24 (June 1979).

⁵⁶ Those who feel confident that this statement is exaggerated would do well to ponder the adequacy of the preparations for the 1984 Olympic Games to be held in Los Angeles. See *1984 Olympics Not All Fun & Games*, 3 T.V.I.J. 8-12 (1982).

⁵⁷ The late Alona Evans wrote:

In handling terrorist incidents in the aviation field, prolonged negotiation rather than concession is becoming the preferred policy of the authorities. When prolongation reaches an intolerable duration, however, the price of this policy in the form of the loss of hostage's lives may be too high. Nonetheless, negotiation is to be preferred to concession on the one hand and to humanitarian intervention in a foreign country on the other.

LEGAL ASPECTS OF INTERNATIONAL TERRORISM, *supra* note 11, at 38-39.

⁵⁸ See, e.g., Cooper, *Whither Now? Terrorism on the Brink*, 25 CHITTY'S L.J. 181-90 (1977).

⁵⁹ The taking of the American Embassy in Tehran and certain personnel, thanks to the mass media, has not only been indelibly printed on the minds of the people of the United States, but has also become a landmark in the chronology of our times. Thus, when Pulitzer Prize-winning novelist John Updike writes: "The hostages have been taken," in J. UPDIKE,

a development. Neither the world community in general nor the United States in particular was adequately prepared to respond to the hostage-taking.⁶⁰ Yet lessons have been, and continue to be learned.

Present day responses to terrorism are striking in comparison with those of the early 1970's. Nations have awakened, albeit slowly, to their responsibilities. Most are now prepared to do something in response to the event rather than abjectly abase themselves before the hostage-taker. Beginning with Munich, law enforcement officers throughout the world have begun systematically studying the phenomenon of hostage-taking and have designed programs to cope with hostage-taking.⁶¹ The introduction of such responses has cast the subject of hostage-rights in an entirely new perspective. The most significant impact upon hostage-rights has come from the development of official responses to hostage-taking. These responses are far from uniform in their development, but very definite trends can be discerned. These trends represent the dynamic or formative influences in the modern shaping of the rights of the hostage.

VIII. THE AUTHORITIES' RESPONSE

At this point the pressing question is what can the hostage expect of the authorities in response to his plight? That a person has been taken hostage is evidence of some failure of security and a break-down in the system of public order. There is, characteristically, an assignment of responsibility in those cases where the matter is deemed worthy to record. Where one country's nationals have been taken hostage in another country, or while under that country's protection, it is usual for an expression of concern to be issued that prompts the responsible authorities to respond to the situation. What can and will be done represents an amalgam of the acting country's laws, response philosophies, and practical resources, as modified by the pressures of the international community and the effectiveness of the urgings of the country (or countries) whose nationals are at risk. Sometimes the urgings are little more than a diplomatic nicety, a sort of "We expect you to fulfill your obligations under the law." At other times, a more interventionist posture is taken. For example, the advice and assistance lent by the Israeli Government to the West

RABBIT IS RICH 313 (1981), the reader has no need to inquire, "Which hostages?"

⁶⁰ "[P]rior to November 1979 no one would have anticipated the seizure of an embassy by a government tolerated group and the holding of its personnel as hostages by that government for more than a year." Green, *Terrorism and the Courts*, 11 MAN. L.J. 333 (1981).

⁶¹ In particular, the program of the New York City Police Department, rightly acclaimed for its approach and success, was developed substantially in response to the stimulus of this event. See H. SCHLOSBERG & L. FREEMAN, *PSYCHOLOGIST WITH A GUN* (1974). The New York City program directly influenced others throughout the United States.

German authorities struggling to cope with the problem at Munich,⁶² or by the United States to the Italian authorities seeking to locate and rescue the kidnapped Brigadier General James Dozier.⁶³ In very few cases, where the responsible country is unwilling or refuses to respond to the plight of the hostage, will the hostage's country feel compelled, as Israel did at Entebbe, to initiate a military response on its citizen's behalf. Any country's responses will be ordered, in the first instance, by policy considerations and by its own philosophical approach to these matters. In the second instance, however, it will respond according to the circumstances of the case, the perceived threat to the country's interests and national security, and the relative importance of the hostage. Many countries have no reluctance in urging others to do what they would not be willing to do in these cases.⁶⁴ Further, some countries, including the United States, handle their domestic hostage-takings differently from those having international implications.

IX. JUDGING THE OUTCOME OF HOSTAGE-TAKING

There are many ways of judging the outcome of a hostage-taking.⁶⁵ One is by reference to the price paid to save the life of the hostage. There are many who would consider the outcome satisfactory whatever the price paid, provided the hostage is safely liberated. Others, however, might have serious reservations with respect to the cost of achieving that positive result; there are few who would regard the outcome of the affair as satisfactory where the life of the hostage is lost, regardless of the other rights that may have been preserved in the process. Under these criteria, the outcome of the Munich hostage-taking was a failure whereas the outcome of the seizure of the hostages in the U.S. Embassy in Tehran was a success. Failure and success in this context are not absolute standards.

⁶² Although responsibility for the tragic outcome at Munich must rest with the West German authorities alone, the presence of a senior Israeli adviser, in whom considerable governmental confidence and authority was reposed, urging a forceful solution, must be seen as having substantial influence. See S. GRONSSARD, *THE BLOOD OF ISRAEL* (1975).

⁶³ See Comment, *On Greenbacks and the Red Brigades*, 3 T.V.I. J. 2 (1982).

⁶⁴ The most flagrant example, perhaps, concerns the take-over on April 30, 1980 by Iranian dissidents of the Embassy of Iran in London. At the time, Iranian militants were holding U.S. personnel hostage in the Embassy in Tehran with the tacit approval of the Iranian government. The Iranian government was loud in its protests about the action taken against its own nationals in London, and most urgent in its representations to the British government to do something about the problem.

⁶⁵ Most of these depend, wittingly or otherwise on some application of game theory. For one view, from a police perspective, see A.F. Maksymchuk, *Strategies For Hostage-Taking Incidents*, *THE POLICE CHIEF* 58-65 (April 1982). Maksymchuk asserts without providing any supporting evidence, "Negotiating a conflict usually terminates in a true 'win-win' result." *Id.* at 58.

Thus, at Entebbe, which is regarded widely as a positive outcome to the seizure of the Air France A300B, some lives were lost to save a group of hostages who were otherwise almost certainly consigned to death at the hands of their captors.⁶⁶ Under this view, the fate of the hostage-takers is almost irrelevant to an appraisal of the outcome; if they are killed or captured, it is merely another positive consequence.⁶⁷ There can be no doubt where the hostage would stand in these matters. Any outcome in which his safety and survival are paramount is positive, whereas the opposite result is negative. Generally, national and international responses are oriented towards achieving positive outcomes from the point of view of the hostage.

However, there is another way of looking at hostage-taking, and traces of this view are still apparent in the response policies of many states. Perhaps the largest, most monstrous, and certainly the most ambitious hostage-holding operation of modern times was the Holocaust, where millions of European Jews were victimized by Nazi Germany during World War II.⁶⁸ The enormity of what was being done, together with the terrible pressures of the times obscured the nature of the Nazi program. Yet, towards the War's end, the blatant attempt to hold the Jews of Hungary in ransom for much needed war supplies revealed matters in their true light. The Churchillian response was characteristic. In a message to Eden, the British Prime Minister said:

This persecution of Jews in Hungary is probably the greatest and most horrible crime ever committed in the whole history of the world. . . . There should, therefore, in my opinion be no negotiations of any kind on the subject. Declarations should be made in public, that everyone connected with it will be hunted down and put to death.⁶⁹

Such pronouncements have a fine, brave ring about them, but they offer little practical comfort to the hostages and even less solace to their helpless loved ones. Such notions of deterrence through retribution persist

⁶⁶ On this, see Y. BEN-PORAT, E. HABER, & Z. SCHIFF, *ENTEBBE RESCUE* (1976). This book, written with a certain amount of official assistance, contains some very revealing insights into the dilemma faced by the Israeli authorities. See also Tinnin, *Terror, Inc.*, *PLAYBOY* 180 (May 1977).

⁶⁷ The sentiment implied here is that sincerely felt by many although it would be impolitic to express it. More usually, we find such expressions as that contained in the NEW YORK CITY POLICE DEPARTMENT, *TACTICAL MANUAL FOR HOSTAGE-SITUATIONS*. "Every decision that's made should be predicted on the philosophy that human life - the hostage's, the police officer's and the captors - is sacred and constitutes the first priority in devising any strategy." *Id.* at 5.

⁶⁸ "The Nazi government even reached out and tried to silence world Jewry by threatening that protests would make matters worse for the Jews of Germany." A. NEIER, *DEFENDING MY ENEMY* 166 (1979).

⁶⁹ G. HAUSNER, *JUSTICE IN JERUSALEM* 249 (1966).

into our times. Churchill's philosophy is the spiritual precursor once removed from that which formed Israeli policy at Ma'alot.⁷⁰

X. AVENUES OF ACHIEVING A RESULT

While reasonably broad agreement might be found on what is or is not a positive outcome, views tend to differ quite widely upon how best to achieve the desired result. History and experience have not always been helpful guides for planning response policies. A common thread of success is yet to emerge from the tangled skein of events. The options themselves are reasonably clear, and comparatively few in number. There is no pre-ordained best way of handling a hostage situation; what is best is that which leads to a good, as opposed to a bad, outcome. The exercise of the available options has given rise to such different and often unpredictable results that it is difficult to base a policy preference on demonstrated efficacy alone. Assuming the hostage-taking event to be concluded by the death or the safe recovery of the hostage, this result can be achieved only in one of the following ways:

(a) *By an act of self-help.*

Here the hostage secures his own release from his predicament by escaping,⁷¹ by overpowering his captor,⁷² or by talking his way out of the situation.⁷³

(b) *By attrition.*

⁷⁰ The killing of 21 Israeli children at Ma'alot in May, 1974 as a result of an abortive assault to secure their release by armed force remains a blot on the Israeli escutcheon. Hacker has written of the choice of the military option, in the face of a softer alternative: "The only explanation for this is psychological. Could it be that, deep down, some government officials or security officers did not want any conclusion other than a violent confrontation with the hated enemy, in spite of their officially expressed concern for the victims?" Hacker, *supra* note 51, at 189-190.

⁷¹ In January, 1973, in what was to prove the first major test of the hostage negotiation team of the New York City Police Department, four black gunmen took 12 hostages in the course of an aborted robbery of John & Al's Sporting Goods Store in the Williamsburg section of Brooklyn, N.Y. On January 21, 1973, toward the end of the 47-hour siege, the remaining 9 hostages, led by the co-owner of the store escaped through a concealed stairway, thereby depriving the hostage-takers of their shield and their bargaining power.

⁷² In an unusual case, a Filipino gunman who had held 14 hostages in a bank on an American naval base at Subic Bay, in the Philippines for two and a half days was beaten over the head and shot to death on December 22, 1977 after being overpowered by the hostages who, apparently, had reacted to the hostage-taker's abuse of one of the female victims. N.Y. Times, Dec. 23, 1977 at 16.

⁷³ This was most effectively done by one of the female hostages aboard the Air France A300B skyjacked to Entebbe in June, 1976. Patricia Martel, a nurse, feigned pregnancy and persuaded the authorities in Libya to allow her to leave the aircraft shortly after it had landed in that country. An account of this resourceful and successful action is contained in Y. BEN-PORAT, E. HABER & Z. SCHIFF, *supra* note 66, at 34.

In this case, the hostage-taker is worn down by the pressure of events and gives up on his intention to exchange the hostage for some item of value to him.⁷⁴ As a result, the hostage may be released, only slightly worse for his experience, or he may be killed out of anger, frustration, disappointment or to facilitate a resolution of the matter for the hostage-taker.

(c) *By the use of force.*

This is an heroic measure of recovery almost invariably mounted by the armed forces of the nation state. It is an operation of considerable sophistication, where hostage rescue is the primary objective, for it involves a fine calculation of how much (or how little) force is needed to accomplish the end and whether the hostage-taker(s) can be incapacitated before the hostage(s) is harmed.⁷⁵ The use of force by West Germany had a bad outcome at Munich in 1972 and a good outcome five years later at Mogadishu, Somalia. The difference is to be found in technique, preparation, and a lot of luck.⁷⁶

(d) *Through the use of negotiation.*

By this means, an agreement is sought with the hostage-taker whereby he undertakes to release the hostage in consideration for concessions made to him. By its very nature, this means is repugnant to those from whom these concessions are forced by this criminal activity.⁷⁷ But it has proven to be an effective, and often the only way of securing the safe release of the hostage.

In the absence of the certainty of result based upon the efficacy of the process alone, the choice of response in any particular case has tended to be the product of a complex web of factors that require careful analy-

⁷⁴ For a good first-person account of the dynamics of such a case, see Rabe, *Showdown on Wisconsin Avenue*, GUIDEPPOSTS 8-11 (Sept. 1977).

⁷⁵ Surprisingly little hard research has been done on this. Mostly, matters are left to the tactical judgment of the commander of the operation. For a preliminary investigation of the problem, see Muirhead, *Some Comments on the Hostage Situation*, THE POLICE CHIEF 46-47, 81 (Feb. 1978). See also Cooper, *supra* note 49, at 12, where a mathematical approach to the problem is suggested.

⁷⁶ General (then Colonel) Ulrich Wegener, Commander of the GSG-9 special force that performed the brilliant rescue of the passengers and crew of Lufthansa flight 181 at Mogadishu in September, 1977 has consistently admitted to this element in his many conferences to law enforcement officials around the world. The margin between success and failure was thin indeed, and but a slight mishap could have frustrated the operation on which so much care and patience has been expended. By way of contrast, the undoubted bad luck that attended the abortive U.S. rescue mission in Iran in April, 1980 can hardly be said to have been determinative of the result.

⁷⁷ It has been appropriately pointed out that, "The Israelis, of course, have special emotional, political, and military reasons for never giving in to terrorist blackmail. But the decision to sacrifice innocent people would be one that would haunt the statesmen of any other country for the rest of their lives." C. DOBSON & R. PAYNE, THE CARLOS COMPLEX 231-32 (1977). Negotiation with hostage-takers, even where the Israeli imperatives do not operate on the minds of those concerned, is never undertaken with relish.

sis. Why one nation, or even one police force, responds in one way rather than another is not immediately obvious from the nature of the event or the past history of responses. What works in one instance may well lead to a disastrous outcome in another instance. Most of what can be usefully said about responses to hostage-taking, world-wide, is impressionistic.⁷⁸ People in charge have feelings about the proper way to handle matters, and these feelings are converted into policy and into modes of operation.

Those upon whom the obligation to respond is imposed are divided into two camps. The first camp favors terminating hostage-taking incidents by force while the second camp favors bringing hostage-taking incidents to an end through negotiation. Today, there is a strong tendency to favor conflict resolution through negotiation rather than the use of force.⁷⁹ Two world wars, a host of smaller wars in this century, and the ever-present threat of a third world war have served to persuade many that survival lies in negotiating differences rather than in seeking settlement through the clash of arms.⁸⁰ The sentiments generated by these very real apprehensions have translated themselves into a host of international institutions and obligations that, however imperfect, are designed to keep the peace. As a result, we are tending to rely increasingly on the international equivalent of the Neighborhood Cooperative Patrol rather than a superpower as World Policeman. There is a keen, if unarticulated, sense abroad that any conflict, however local, has the potential for starting a world-wide conflagration that might be extremely difficult to contain.⁸¹

There is constant pressure from the world community to settle differences through negotiation. Consequently, there has been, by a kind of "trickle down" effect, a marked influence upon policies for the handling

⁷⁸ See A.H. MILLER, *TERRORISM & HOSTAGE NEGOTIATIONS* (1980).

⁷⁹ One whose attainments in the field of negotiation place him in the forefront has aptly observed, "We cannot pump oil with tactical nuclear weapons. It cannot be done. We have got to work with people." Fisher, *The Iranian Crisis: Who Should do What?* 14 AKRON L. REV. 1, 10 (1980). Professor Fisher's book, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*, with William Ury (1981), is an indispensable guide for all negotiators.

⁸⁰ "It should be recalled that until after World War I a state was regarded as entitled to have recourse to force and war whenever it saw fit. Now, of course, law attempts to regulate recourse to force in international relations, restricting its legitimate role to situations of individual and collective self-defense or to security operations that have been authorized by the United Nations." R. FALK, *LEGAL ORDER IN A VIOLENT WORLD* 63 (1968).

⁸¹ Hence, the untiring efforts of the world community to secure the peaceful evacuation of the PLO from Beirut despite the clear military preference indicated by Israel. The parallel between this situation and a conventional hostage-taking incident is striking. It is likely that the Israelis could have removed the "hostage-taker," the PLO, by force of arms (although at a high cost in Israeli lives), but this would only have been possible by ignoring, altogether, the rights of the "hostages," the civilian population of West Beirut. That this was, seemingly, unacceptable to the world community is significant evidence for the case made here.

of hostage-taking incidents. While hostage-taking incidents rarely reach the dimensions and importance of other kinds of international conflicts, they have become sufficiently interwoven into the fabric of Third World Politics, struggles for self-determination, and struggles for human rights to have become infected with a substantial dose of these larger ideas.⁸² Hostage-takers, at least those who have some political motivation for their acts, have achieved a recognition that accords them participation, in the game of negotiation.⁸³ What remains for policy makers, especially those interested in the subject of hostage rights, is to define the rules of the game.

Presently, there is a strong sentiment that suggests negotiation with hostage-takers be attempted before force is used. Indeed, it might even be averred that force should be used only as a last resort to rescue hostages who would certainly otherwise perish.⁸⁴ Yet substantial inconsistencies remain. At least theoretically, the tendency to require negotiation first is stronger in the international sphere than in the domestic sphere. This reflects the absence of appropriate enforcement mechanisms in the international community and the confidence held by most states in the efficacy of their own domestic police powers. In many states, the hostage-taker is seen as an unacceptable threat to the national security which must be forcefully put down except where the hostage or hostages he has seized are so valuable that the preservation of their lives overrides all other considerations.⁸⁵ Curiously, while there has been a move towards

⁸² It has been pointed out that, "The many conventions and declarations that were prepared by the United Nations - such as the Friendly Relations Declaration, three conventions to prevent aircraft hijackings, the Convention Against the Taking of Hostages, the definition of aggression and the draft of a Convention to Prevent International Terrorism - all contain deliberately ambiguous clauses so the parties would interpret the opaque phrases in their own interests." Ferencz, *When One Person's Terrorism is Another Person's Heroism*, 9 HUM. RTS. 38, 42 (1981).

⁸³ For a fuller development of the concept of these kinds of negotiations as a game, see Cooper, *Special Problems in Negotiating with Terrorists*, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE (CTT Series 1982).

⁸⁴ "I admit, reluctantly, and without pleasure, that in some very rare instances, resorting to force and violence offers the only morally and pragmatically acceptable solution to a desperate situation. But my passionate commitment to the protection of individual human life compels me to approve of violence (the military option) only after all other nonviolent alternatives have been carefully explored and honestly tried." Hacker, *supra* note 51, at 327. This statement is certainly representative of a very influential body of opinion in the United States.

⁸⁵ Thus, the problem for the West German terrorists throughout the 1970's lay in selecting a target hostage of such importance that their demands (principally for the release of incarcerated comrades) would have to be met. The resoluteness of the Federal authorities in refusing to negotiate for the life of Hanns Martin Schleyer and those aboard Lufthansa Flight 181 led to some extreme thinking, including a plot to abduct Pope Paul VI. On this bizarre scheme, for which preparations were seemingly mounted, see *A Terrorist's Story*,

more pacific methods of conflict resolution in international matters there has been a hardening of attitudes domestically and an increased reliance upon the development of those military and quasi-military capabilities that enhance the prospects of terminating the event by force rather than by negotiation.⁸⁶

Neither side can appeal with a moral certainty to any objective standards of measurement that would persuade the other that the suggested way of handling the matter is the right method. Lives have been saved, as well as lost, by assaulting hostage-takers to save the hostages.⁸⁷ Lives have been saved when negotiation has proved fruitful and they have been lost when negotiation has failed.⁸⁸ It is at least as difficult to predict what might have happened had certain forceful responses not been mounted as it is to estimate whether the concessions made in settling other events have encouraged hostage-takers to pursue these bargaining tactics against those with a demonstrated willingness to negotiate.⁸⁹ All this makes matters very difficult for the hostage or potential hostage. Not only does he

The Globe & Mail, Sept. 11, 1978, at 19, a translation of Hans-Joachim Klein's revelations to *Der Spiegel*.

⁸⁶ During the 1970's para-military law enforcement units under the acronym SWAT (Special Weapons and Tactics) or its analogs proliferated in response to media enthusiasm and a healthy injection of federal funding. Later, a reaction was to set in. An experienced police administrator has written: "Not even the largest American police agency can spare the several score personnel needed as the minimum reactive force. Even if such personnel were available, the problems of assembling them quickly are extremely difficult for an agency working in shifts and not living in barracks. It is hardly feasible for any U.S. police agency to have 60 (or more) officers, standing by, on a 24-hour basis, for a possible call to action. Medium-size agencies have enough trouble keeping even 5-man SWAT teams intact, ready, and sharply trained." Epstein, *Terror & Response*, THE POLICE CHIEF, 34, 82-83 (Nov. 1978).

⁸⁷ The classic rescues at Entebbe, Mogadishu, and the Iranian Embassy in London furnish dramatic examples of hostages being literally snatched from the jaws of death by armed force. Against this, to select from but a few, must be placed the tragedies at Munich and Ma'alot which almost surely condemned a large number of the hostages to death. Detailed comparisons of these events are useful and instructive.

⁸⁸ Negotiation has produced some striking successes, even though these might be less film-worthy than the Entebbe raid. Negotiation unquestionably saved the lives of the American hostages in Tehran whereas it is doubtful in the extreme if armed force would have produced that happy result. Closer to home, negotiation saved the hostages in the Hanafi incident in Washington, D.C. whereas force would almost certainly have led to bloodshed. Negotiation failed to win the release of Aldo Moro, perhaps because neither side could satisfy the fundamental conditions of the other.

⁸⁹ Some countries have become, rightly or wrongly, identified with a hard-line, no concessions policy, as opposed to others that take a more pragmatic, conciliatory approach to the hostage problem. There is too little agreement on the respective values of these opposing positions to be able to evaluate them in other than impressionistic terms. On this, see generally, DISORDERS & TERRORISM 430-35.

not know what response to expect to his plight,⁹⁰ he does not know what response is more likely to enhance his chances of survival.

It is probably accurate to state that most hostages dread a deadly exchange of gunfire between their captors and those who have mounted an assault to rescue them.⁹¹ Being caught in the middle is but one concern since the gun pointed to the hostage's head by the hostage-taker brings the fear of death even closer. Yet is this really worse than dying alone in some undiscovered people's prison when negotiations have failed to satisfy those who have seized and held them? Might not these victims, in their last moments, have hoped and prayed that security forces might yet burst in to give a fleeting chance of life? For the armed assault does work, a high proportion have been successful, where all else has failed, and they have succeeded because they were mounted at the most propitious moment.⁹² Consequently, the hostage does not know how best to formulate claims against those charged with the duty to respond. Should the duty require that negotiation be preferred over force? Should negotiation always be tried first, with assault relegated to a matter of last resort? Should the use of force to resolve these matters always be ruled out as a response? Given the present state of the art, most hostages would be well advised not to press their rights too closely, and a majority would be content to do just that. They must, in a matter where so fine a judgment is involved, simply say, "Do what you think is best to save me." The confidence thus reposed is better placed in some parts of the world than in others. That is, and will remain, the hostage's eternal dilemma.

⁹⁰ Thus, Jennifer Libbee, taken hostage in a Silver Spring, Maryland bank in February, 1977 felt little fear of her captor: "I never felt he would hurt me." By way of contrast, she was greatly concerned by what she conceived of as a possible police response: "All I could think of was that they would do something wild, come in blasting away, like in 'Victory in Entebbe.'" *The Washington Post*, Feb. 20, 1977, at A4. It is noteworthy that the hostage-taker fired his two rifles wildly through the ceiling of the bank without attracting a police shot in return.

⁹¹ This apprehension is shared by others speaking from a safer vantage point. Armed intervention to terminate unlawful interference with aircraft is increasing. Concern regarding such tactics is not new. "The International Air Pilots Association protested at the danger to passengers which is involved in such 'go-for-broke' shootouts." Poulantzas, *The Anti-Hijack Convention of December 16, 1970: An Article - by - Article Appraisal in Light of Recent Developments*, 2 *ANGLO-AM.* 1-40 (1973). "It is difficult to imagine the distressful feelings of an aircraft passenger who is held at gunpoint by a hijacker and possibly at the same time being exposed to physical harm from security personnel who may be determined to use counter force to deter the hijackers." See also Avgoustis, *Hijacking & the Controller*, 3 *AMR L.* 91-92 (1978).

⁹² The extraordinary police operation that rescued General James Dozier from his Red Brigades kidnappers in Padua on January 28, 1982 was a masterpiece of timing and logistics. See 3 *T.V.I.J.* 28-30 (1982). See also V. Pisano, *Terrorism in Italy: The "Dozier" Affair*, *THE POLICE CHIEF* 38-41 (April 1982).

XI. THE RIGHTS OF HOSTAGES

The hostage's fate, however, is not left at the mercy of the caprices of individual policymakers. The hostage is far from being a mere pawn in the game of hostage-taking even though the rules of play are still somewhat uncertain. It is clearly expected by all that the game must be played according to its rules, whatever the rules might be. The rules impose obligations upon the players, especially upon those in a position to make the moves in hostage-taking incidents. There are growing expectations that the participants will conduct their play in certain ways and that they will, if for no other reason than a desire to keep the game going and all the pieces on the board, conform their play to certain standards.⁹³ Above all, it is required of the players to play the game in good faith; the hostage has a right to expect that he will not be sacrificed on a whim. Even his right to life may have to be relinquished to the preservation of some greater right, although it may be argued whether any greater right can exist. But the hostage is entitled to a reasoned decision on the matter even if it should go against him. If the hostage is to be sacrificed for some greater good, he is entitled to know it.

What does all this mean in practical terms for the rights of hostages? If the individuals vested with the obligation to respond to a hostage-taking choose to assault the hostage-taker in order to rescue the hostage, they must act in protection of the hostage's rights. If, on the other hand, the objective of ordering a forceful response is to bring to heel a contumacious hostage-taker and to reimpose the law while pretending to rescue the hostage, then it is suggested that this would not be playing the game, it would be an abuse of the hostage's rights however effective the action might, in fact, have been.⁹⁴

XII. PRIVATE INITIATIVES IN HOSTAGE-TAKING

The public character of response patterns and of those having charge

⁹³ Thus, Professor Fisher, speaking of the Iranian hostage crisis, opined: "Our first interest was in the rule of the game: not to have diplomats seized and held for extortion." Fisher, *supra* note 79, at 3. He reasons, aptly: "A poker player, like a statesman in Iran or Afghanistan or in the United States wants to have the ability to influence the future; he wants power." *Id.* at 2. Professor Falk observes: "Most nations seem sensitive about their reputations and eschew illegal conduct except when acting under great pressure." Falk, *supra* note 80, at 73.

⁹⁴ It is precisely this that is alleged in the case of the killing in Kabul on February 14, 1979 of U.S. Ambassador Adolph Dubs while being held by those who had abducted him. Despite repeated pleas by U.S. officials to negotiate, to play for time, an assault was mounted that led, predictably to the Ambassador's death. See *Assassination in Kabul: How Soviet Agents Set Up a U.S. Ambassador in a 'Shooting Gallery,'* Dallas Times Herald, Perspective L.

of their selection, design, and implementation has dominated the discussion thus far. For the most part, the responses to hostage-taking are generated by persons acting in a public, rather than a private capacity. The opportunities for intervention by private parties are generally quite limited, but are not without significance. As a rule, strangers to the action, members of the community as a whole against whom the hostage-taking is more remotely directed, are entitled to look to public officials for a response. Private parties are limited, however, to approving or disapproving what is done on their behalf at some later point in time. The citizen who seeks to interfere with the police management of a hostage-taking incident by some unofficial initiative designed to rescue the hostage would be promptly restrained or arrested, however close his relationship to the hostage or however reasonable the character of his proposed intervention. Most events involving the taking of hostages leave little room for such private initiatives, and only very little for private cooperation with the authorities. Where private individuals are co-opted, their action becomes part of the official response and it is usually in the area of mediation that such private third party assistance is welcomed or required.⁹⁵ The mediator really has a facilitating role; he lends his special skills or attributes to the cause.

What obligation does a private individual who has some special ability to influence the course of a hostage-taking owe to the hostage? He cannot be forced to lend himself as a participant, but once he does engage his skills, he must act with due care and with the interests of the hostage in mind.⁹⁶ If the private individual desires to remain neutral he must not act at all. If he wishes to act in a partisan fashion, he must range himself squarely alongside the hostage-taker with all its implications of responsibility.

In the case of kidnapping, where the victim is transported by his captor from the place where he is seized and is held in a location unknown to

⁹⁵ The role of the lawyer is particularly important, for his participation may be sought by the hostage-taker. Because of the lawyer's real power to influence events, his intervention raises serious ethical and other issues. See generally Schornhorst, *The Lawyer & The Terrorist: Another Ethical Dilemma*, 53 IND. L.J. 679 (1978). The potential for interference with the law enforcement function is clearly very great and was only avoided, in the matters of which Mr. Schornhorst writes, by a most delicate and professional approach by those concerned.

⁹⁶ The agonies of the truly neutral faced with these responsibilities are vividly drawn by TOM WICKER, *A TIME TO DIE* (1975). He writes, poignantly: "He did not doubt the imperative to speak that had been placed upon him by the realization. Fear, not least for his own safety, offered its insidious counsel, but he understood that the possibilities were as unclear one way as the other, whether he spoke or did not. He knew what was expected of him, what he expected himself. The moments passed. More hostages came forward to be interviewed. But he did not speak . . . it seems." *Id.* 242-43. His position may be usefully compared with that of William Kunstler who had undertaken to be of counsel to the inmates.

the authorities, the opportunities for private initiative and the corresponding obligations may be much greater. The first communication of the victim's plight may be made by the hostage-taker to a private individual, who may be further enjoined not to contact authorities under threat of injury to the person kidnapped.⁹⁷ What obligation does the recipient of such a message owe to the victim? Must he heed the kidnapper's warning against the promptings of his own good sense and the dictates of the law? Consider if he disobeys, informs the police, and the hostage is killed as a result. Consider if he fails to notify the proper authorities and acts, in good conscience and on his own initiative, to comply with the demands and the victim is killed? Can the private individual opt out of any involvement at all in these matters? Consider if such an eventuality has been given prior consideration and has been the subject of settled policy or written instructions? Does it alter the case if these instructions have been disobeyed or disregarded? What are the obligations of private individuals who offer specialized services such as counseling or mediation so as to bring about the release of the hostage victim? And, finally, perhaps the thorniest question of all. What obligations are owed by a corporate officer who has fiduciary standing in relation to funds out of which a ransom might be paid, funds in which the hostage has no beneficial interest?⁹⁸ The foregoing questions touch vitally upon areas of international law, foreign law, torts, contract, corporations, agency and a host of specialized branches such as insurance and air law. Furthermore, these questions have important, practical significance since business executives and others have become prime targets of kidnappers. The protection of hostage-rights will become clearer and more sharply defined as these questions are answered through litigation.

⁹⁷ There is good reason to believe that many more kidnappings actually take place than are reported to the authorities. Sometimes, silence is maintained to avoid stimulating others and also to allay future victimization possibilities from the same perpetrators. But more often, the immediate threat of the kidnapper is heeded and private settlement of the affair is arranged without the authorities being drawn into the matter at all. Kidnappers, amateur and professional, have a real fear of the official resources that can be brought to bear against their enterprise and seek, often by the most ingenious of methods, to induce a fear of communicating with the police, at least in the early stages, when a prompt response might frustrate their setting up satisfactory ransom arrangements.

⁹⁸ *Flick v. Exxon*, (Supreme Ct. N.Y. County, 1980) (unreported), arose out of payment of \$14.2 million to ransom Victor Samuelson, General Manager Esso-Argentina, kidnapped by the ERP on December 6, 1973 in Argentina. Suit was originally brought in 1974 in California but failed for want of jurisdiction. Complainant alleged ransom was an *ultra vires* gift in breach of the fiduciary duties of the corporation and individual board members. An independent Committee on Litigation constituted to review these actions held payment was not *ultra vires*. Cahn J. upheld this, on the facts as a valid business judgment. Further limited discovery was allowed the plaintiffs who do not seem to have pursued the matter to a finality.

XIII. SELF-HELP AND THE HOSTAGE IN EXTREMIS.

*They did the wrong thing, but they responded as most people would do to the situation of starvation and despair.*⁹⁹

The common law tradition has not been particularly understanding towards those who, finding themselves in dire straits, have severely injured the interests of others in the process of extrication. The defense of necessity has been, and continues to be, looked upon with suspicion and is limited by exceptions and reservations that press exceedingly hard upon a person who has survived, by the narrowest of margins, some life-threatening experience. Other legal systems have been scarcely less generous, but there has been a growing recognition of the need to introduce a measure of equity into this branch of the criminal law so as to distribute the effects of the harm among the unfortunate parties rather than lodging all the responsibility for it upon its material author.¹⁰⁰ These matters are of the greatest interest to the hostage for they affect those very rights which touch upon his survival.

For all practical purposes, the hostage is a person from whom the umbrella of the law has been temporarily withdrawn. He is literally in the power of individuals who can take his life at any moment. The armed might of the state is unable to interpose itself effectively between the hostage and his assailant. In these dreadful moments, the victim, whether dangled by his feet in full view of the authorities¹⁰¹ or held in some unknown, undiscoverable jungle fastness, is in the most real sense quite alone.¹⁰² What is done is determined by the circumstances, and the individual psychology of the victim. Some will scheme and fight for their own survival with all the means that remain at their disposal. This is the class with which the law is most concerned, for these persons, in their desperation, will survive or perish in the attempt. That they may cause death or serious hardship to others, or extensive damage to third party property in the course of their endeavors is what will be addressed.

The right of self-defense is a special subsection of the general defense

⁹⁹ Fletcher, *supra* note 21, at 1387.

¹⁰⁰ For a detailed examination of the principles involved, see H.H.A. COOPER, *LA NO EXIGIBILIDAD DE OTRA CONDUCTA EN EL DERECHO PERUANO* (1970).

¹⁰¹ In the Hanafi hostage case it was reported: "Hostages were told that if police failed to remove snipers from the roofs of nearby buildings, the hostages would be hung by the feet." The Washington Post, March 12, 1977, at A12. One of the hostages, Hank Siegel writes: "Once, spotting sharpshooters in the Holiday Inn, they threatened to hang two of the men out the window by their feet." There are foreign precedents for this ugly action.

¹⁰² The kidnap victim may feel quite as alone much closer to home. Jack W. Evans, Sr. then President of Cullum Companies, presently Mayor of Dallas, Texas, was kidnapped on February 3, 1978 and held in a motel not far from his home. Of his experience, Mayor Evans says, "Blindfolded, gagged, and bound, I just never felt such loneliness." Simmons, *Kidnapped: The Growing Threat to Texas' Top Execs*, TEX. BUS. 30 (Nov. 1978).

of necessity. It is the exception allowed at law to an individual who is faced with immediate, naked aggression against his person, and it allows him to resist that aggression with any means at his disposal; taking, if necessary, the life of the aggressor in the process. Some relief from the absolute liability for causing the death of another human being is deemed necessary in every system of law. Yet the inherent possibilities for abuse remain and the benefit of such a defense has been consistently restricted by narrow construction, interpretation, and application. Early, primitive criminal law was not concerned with why a forbidden act was done, for those who administered the law felt ill-equipped to look into the dark labyrinth of the human mind.¹⁰³ The belief that the legal system can call upon psychologists and psychiatrists to understand and appreciate some of the workings of the human mind has led to extensions in the law relating to criminal responsibility, and to a certain enlightenment in the law relating to self-defense. In particular, there is now a greater willingness to take account of the subjective viewpoint of the individual threatened by the harm that led to the act of self-defense, rather than by reference to some artificially recreated objective standard.¹⁰⁴ This process has enlarged the scope and application of self-defense. However, this enlargement has been resisted by others who have felt it tended to give blanket approval to almost anything that might justify defense of life and limb. Even the most liberal of systems has shown understandable reluctance to justify or excuse the killing of a human being on grounds so open to abuse. For this reason, the right of self-defense is usually limited by a requirement that the act be *reasonable*, *necessary*, and *proportionate* to the harm apprehended. Whether these criteria are given a subjective or an objective appreciation by those judging the matter is the key to the width or narrowness of the defense at law. The defense has been further extended to allow appropriate action against an aggressor, under certain circumstances, such as to save the life of another.

¹⁰³ Other questions of penal policy were of higher importance than such unprofitable investigations, as shown by Frederic William Maitland in his classic, *The Early History of Malice Aforethought* in 1 THE COLLECTED PAPERS 304-28 (1911).

But in the days of the blood feud, such days for example as are represented by the story of Burnt Njal, mere deliberation or premeditation cannot have been thought an aggravation of the crime, a man was entitled to kill his enemy provided that he was expected to kill his enemy in a fair, open, honest manner, not to take a mean advantage, not to fall upon him like a thief in the dark.

Id. at 328.

¹⁰⁴ One distinguished authority has said "If necessity is a defense, the citizen must be allowed to act on the facts as they seem to him to be." Williams, *A Commentary on R. v. Dudley & Stephens*, 8 CAMBRIAN L. REV. 94, 97 (1977). In recent times, the law of more and more jurisdictions in the United States has moved towards that position with regard to criminal responsibility. But the acceptance of matters through the eyes of the actor is far from universal.

The impact of the life-threatening situation upon the hostage and his psyche will vary markedly from case to case. No one can doubt the immediacy of the threat to life posed by an armed criminal who is holding a loaded handgun to one's temple,¹⁰⁵ or strapping explosives to one's chest. Sometimes, the personal threat may be less direct, as in the case of some aerial hijackings, but its menace and implications are distinctly understood. At other times, no visible menace can be detected, yet its presence is unmistakable to the hostage. This latter scenario was expressed in an observation offered by an individual who had undergone such an experience.¹⁰⁶ "There was always a gun pointed at my head. Even when no gun could be seen, there was a gun pointed at my head." In many kidnappings, a victim can be held captive for months, perhaps even years. The conditions of confinement change over time, and in many cases it changes for the better. The victim remains a prisoner; a pawn in a power struggle played out in places remote from the location of captivity. The visible presence of death and its trappings may be gradually withdrawn and combined with denial, the victim begins to adjust to his situation. This allows for a more tolerable physical and mental survival. In these cases, the threat to the victim's life is not really diminished, but its more obvious manifestations have been altered. The threat persists until the victim is either killed or liberated. Yet a curious process takes place under these conditions, one which develops with remarkable rapidity in some cases, even under the watchful eyes of authority. A symbiotic relationship develops between the hostage-taker and his victim.¹⁰⁷ The nature of the relationship and its characteristics differ from case to case, but it is not difficult to see how a strange symbiosis is produced by the dangerous situation which hostage and hostage-taker share.¹⁰⁸ The concern here is not the inhibiting effects of this phenomenon. In the present context, it is sufficient to note that while the real threat does not diminish, the perception of it does diminish. What does this do to the exercise of the hostage's

¹⁰⁵ On January 30, 1978, ABC News Close-up featured a program entitled, "Hostage," full of sensitive insights. A Dutch hostage aboard the train hijacked by the South Mohiccans in June, 1977 said: "Once I asked him, 'What would you do, Max, if I escaped?' He put his pistol to my head and pulled the trigger, but there was no bullet in it, of course. He said, 'That's what I am going to do if you escape. So don't make me do it. I never knew if he really meant it or not.'" Transcript courtesy of ABC News Close-up at p. 11. In political extremist hostage-takings, firepower is usually obvious, both for the reassurance of the hostage-takers and for the intimidation of the victims.

¹⁰⁶ See generally L. LOVELACE, ORDEAL 69 (1980).

¹⁰⁷ See Cooper, *Close Encounters of an Unpleasant Kind: Preliminary Thoughts on the Stockholm Syndrome*, 2 LEGAL MED. Q. 100 (1978).

¹⁰⁸ The hostage-taker is often as much a prisoner as is his own victim. Dr. Fly has written of the ordeal he shared with his captors: "For these brief, tense interludes it seemed that I was a refugee from the arms of the law just as much as these two shaking youngsters whose duty it was to keep me hidden." C. FLY, *supra* note 38, at 70.

rights of self-defense?

Hostage-takers, in the short-term, and certainly in the long-term, tend to become careless of their charges. Sometimes, they so depersonalize their captives in the course of the hostage-holding episode that they cease to have a realistic appreciation of the hostage as a human being or of his capacity for reaction. Incongruously, a kind of confidence, approaching trust, develops between the parties. From the hostage's point of view, this development may have significant protective implications whether it is based on empathy or contempt. Anything that could appease his captor is welcome to the hostage at this point. But as the frequency of a captor's carelessness increases, opportunities to take advantage of such carelessness will also appear. Some hostages will deliberately ignore these opportunities, while others feel helpless to turn them to account.¹⁰⁹ As stated earlier, we are not concerned with the psychological implications of this scenario. Some hostage-takers become careless with their weaponry. They no longer threaten the hostage with its possible use and may also leave it accessible to the hostage. If this occurs fairly soon after the actual seizure of the hostage, it is not difficult to concede the right of self-defense to the hostage taking advantage of this situation. But what effect does lapsed time and changed perceptions have on the situation? Is this an act of self-defense that absolves the hostage from all criminal responsibility for the death of the hostage-taker, or is it an act of vengeance that was not reasonable, necessary, or proportionate to the circumstances?

Ordinarily, there would not be a close enquiry into these matters. Nonetheless, these issues are not unimportant. Hostage-rescue operations are expensive and sometimes hazardous. A great deal of public and private money is often spent to extricate the hostage from his predicament. It is obviously desirable that the event be terminated favorably in the most safe and practical manner. Does the hostage have a positive obligation to participate in bringing about this result? Should he kill the hostage-taker, or even collaborate with the authorities to bring about the death of the hostage-taker, even where the necessary conditions for the exercise of legitimate self-defense are not present?¹¹⁰ Even today, in

¹⁰⁹ Hostage-takers are prone to carelessness with their weapons, often leaving them temptingly within the reach of their victims. Even discounting a ploy designed to lure the hostage into an act of self-help, a hostage's attempt to seize an unfamiliar weapon to take control of the situation is hazardous even for an active person thoroughly familiar with firearms. It has recently been estimated that a police officer armed with a semi-automatic weapon would have an average of 16.2 seconds to react after losing control of his firearm. Cipriano, *Firearms and Law Enforcement Officers Killed: An Alternative*, THE POLICE CHIEF 46 (July, 1982).

¹¹⁰ There have been a number of cases in which hostages have been used to lure their captors within range of a marksman's sights. Such dangerous and uncertain actions would

many states of the United States, the use of force in self-defense is treated as a matter of last resort; there is a clear duty to retreat.¹¹¹ Can the legal community, by a fiction, extend the clear and present danger doctrine throughout the entire episode to excuse or justify the hostage's violence against his aggressor? If not, under what legal exception does this act belong or by what principle shall the hostage be held accountable should he fail, for whatever reason, to bring the hostage-taking to an end where he can? Although such awkward questions may be avoided in practice, there is no excuse to pass them up here.

Multiple hostage-takings pose many troublesome questions of self-defense and, more generally, necessity.¹¹² Different hostages will react to the event differently and with distinct states of mind. Those who react at all will react instinctively.¹¹³

Hostages rarely exert their individual rights of self-defense in planned concert. An instinctive, spontaneous action by a hostage is often surprisingly effective to enable him to liberate himself.¹¹⁴ There have been a number of cases of hostages successfully killing or overpowering their captors;¹¹⁵ but such a move is equally fraught with danger. If it fails,

now be frowned upon by most responsible police authorities in the United States, because these subterfuges would inevitably require the cooperation of those trying to negotiate a hostage settlement, thereby compromising their integrity and diminishing the value of future settlements.

¹¹¹ It has been observed that: "Presently, it is questionable if even a minority of the population of any one state knows whether that state is a retreat or non-retreat jurisdiction." Collins, *The Duty to Retreat*, 3 THE CRIM. JUST. 88 (1975).

¹¹² Is the right of self-defense, in such a situation, a collective one, that can only be exercised by reference to the rights of the many, or does it remain strictly subject to the rules governing its individual employment? Does a person, such as a police officer, who is taken hostage with a group of "civilians," have any special responsibilities imposed upon him with regard to individual and collective defense? Is he under an obligation to the other hostages not to escape, even though he might be able to do so? P.C. Trevor Locke of the London Metropolitan Police remained as a hostage in the Iranian Embassy throughout its siege in May, 1980 although he was secretly armed with a handgun.

¹¹³ Michael Jones, a U.S. Foreign Service Officer, was seized in Montevideo by Tupamaros on July 31, 1970, struck on the head with a pistol, tied up in a blanket and thrown into a pickup truck. "Mr. Jones somehow managed to pull the blanket from his face inch-by-inch so that he could see. Then he swung himself from the fast moving truck and hit the ground so hard that he almost lost consciousness but he had successfully evaded his kidnappers." COMMITTEE ON INTERNAL SECURITY, U.S. HOUSE OF REPRESENTATIVES, 1968-1973 POLITICAL KIDNAPPINGS 18 (1973).

¹¹⁴ There is a high degree of danger in spontaneous acts of self-help because they are uncoordinated with an organized police response. Identification of the actors in the drama poses problems for even the most disciplined force. For a tragic example of a hostage liberating himself from a gunman only to be shot by the police in mistake for the hostage-taker, see *Witness: Hostage Knocked Gun from Suspects Hand*, Dallas Times Herald, Oct. 9, 1979, at B12.

¹¹⁵ On July 25, 1982, the first skyjacking of a Chinese domestic flight was frustrated

it can be expected that the hostage's situation will be substantially worsened. If it fails, the hostage may be immediately killed by an enraged or frightened hostage-taker. If one hostage elects to exercise his own right of self-defense, he must bear a heavy responsibility for his fellow hostages. If he is successful, his actions may result in all being safely liberated from their situation. On the other hand, if his initiative were to fail, he risks bringing down punishment upon himself and also upon those hostages who may not have favored it, or who may have actually opposed it. There is rarely such an opportunity for discussion prior to action. Those who elect to act will generally have formulated their own plans, sought out their own means and opportunities, and can only hope that their actions will meet with the approbation of their fellow hostages. If all goes well, they are likely to receive that approval, however foolhardy the scheme. But the price of failure is almost certainly the condemnation of what was attempted even where the hostage acted in good faith and with the overall interests of the group in mind.

Such action can come at any time during a hostage incident.¹¹⁶ If and when such an act of self-help is conceived and put into effect will depend upon the individual psychology of the actor. Consequently, such actions may be an uncontrollable response to the subject's inner state rather than to the direct stimulus of violence to which he has been subjected. This, gives rise to the question of whether the hostage's action is a genuine act of self-defense. While the question is relevant in the case of a single hostage acting on his own behalf, the matter takes on quite different dimensions when it is viewed as a part of the group dynamic. In a multiple hostage-taking situation, an individual hostage does not have an unfettered right of self-defense. Instead, the right is conditioned upon due regard for the interests of all exposed to the common peril.

Thus far, self-help has been contemplated as some act of physical violence directed against the hostage-taker. However, the use of self-help to preserve the hostage's vital interests can assume many forms, some

when the crew and passengers of the aircraft attacked the five skyjackers with bottles, seat parts, and a mop handle. In the course of this mid-air melee, a grenade exploded killing three of the hijackers and blowing a 3 foot hole in the side of the aircraft. The pilot managed to land the plane safely. N.Y. Times, July 26, 1982, at 4, col. 1. The surviving skyjackers were arrested by the authorities and promptly executed. N.Y. Times, Aug. 20, 1982, at 3, col. 1. Nineteen Americans were reported aboard the aircraft.

¹¹⁶ A protracted hostage incident is very wearing upon the victims and, as time passes, hostages find it increasingly difficult to curb their impulsivity. The people managing the counter-measures have to take into account these possibilities when calculating how long they can allow negotiations to continue. Dr. Dick Mulder, the Dutch psychiatrist who failed to persuade the South Mohiccans to surrender in June, 1977 has said: "[He] ran out of time because of fear that the terrorists had pushed their captives to the limit of their psychological and physical endurance." *Dutch Psychiatrist Assesses the Terrorists*, N.Y. Times, June 12, 1977, at 3, col. 1.

subtle and not always immediately recognizable as acts of self-defense. While the behavior of some hostages may be noble and altruistic, no hostage can be expected to sacrifice his own interests, and possibly his life to secure the interests of another whose rights are no greater than his own. What is more controversial is the degree of restraint that can reasonably be expected of those seeking to better their own positions without worsening the positions of their fellow hostages.¹¹⁷ Their behavior is analogous to prisoners of war and other captives taken in more conventional conflicts. The desire for self-preservation and survival is very strong in many, and manifests itself in practical ways designed to ameliorate the hardships of captivity and its attendant perils to life and limb. Some choose, however, without much reflection to collaborate with their captors so that they might be spared the harsh treatment anticipated.¹¹⁸ A very wide range of behavior is comprehended in the term collaboration and during a protracted hostage-taking, some victims become virtual accomplices.¹¹⁹ Some hostages clearly must cooperate with the hostage-taker in order to fulfill their obligation to the fellow hostages. For example, few aerial hijackings can be successfully accomplished without the full cooperation of those capable of piloting the aircraft. Most airline flight personnel, therefore, choose to cooperate with the hostage-taker and some are under a positive duty to do so.¹²⁰ While few hostages have such a vital role,

¹¹⁷ Many hostages have acted altruistically, jeopardizing their own prospects of survival in the interests of not worsening those of others. Thus, in the Hanafi incident, it was reported by one hostage, Dr. Rauf: "At one point [he] could have escaped out a side door while his guard was in the other office but decided not to for fear that the others would be killed." *The Wash. Post*, Mar. 12, 1977, at A13.

¹¹⁸ The hostage is thrust almost immediately into a childlike dependence upon his captor. He cannot eat, sleep, go to the toilet, or even continue to live without his captor's approval. In order to break out of that uncomfortable feeling of infancy, the hostage will act in certain ways in an attempt to win his captor's approval thereby assuring his own safety. To feel comfortable with his new behavior, he must adopt an attitude that justifies it. So he begins to believe in what he is doing, not just as defensive behavior, but as reasonable, normal behavior. He begins to believe again in himself, in his ability to control his own destiny. *Hostage*, *supra* note 105.

¹¹⁹ The famous Moro letters and the tapes made by Patricia Hearst are cases in point. Some victims have even helped their captors frame ransom notes. It may be asked whether such acts of self-help are different in kind or only degree from the case, for example, of the bank manager who is forced to accompany his captors to open the vaults while his family is held hostage to ensure his compliance and good behavior. See Wysatta, *Police Search for Bank Extortioners*, *Dallas Times Herald*, Dec. 6, 1979, at B6.

¹²⁰ It has been correctly stated by the General Counsel of Delta Airlines, "The threat to life is the initial consideration in an airline's handling of each skyjacking attempt; it must - and it will - remain so." Maurer, *Skyjacking and Airport Security*, 39 J. AIR L. & COM. 361, 380 (1973). These precepts are translated by most commercial airlines into instructions to aircrew to avoid behavior that might lead to a confrontation and to manifest a willingness to cooperate with the hijacker in bringing the event to a conclusion that avoids harm to persons and property.

other hostages can collaborate in ways that make their captor's tasks easier thereby increasing the difficulties for the responding authorities.

What limits are imposed by the law upon such programs of hostage self-help? Actions such as answering the telephone or undertaking other menial duties, such as preparing and serving food for their captors, must be balanced against the dangers arising out of non-cooperation. Consider, however, the hostage who prepares something in the nature of a protective shield for the hostage-taker,¹²¹ reports the movements and disposition of the responding forces, cleans or safeguards his captor's weapons, or in extreme cases, acts as an additional custodian to enforce the good behavior of the other hostages? Carrying such matters a step further, how are we to view the acts of the hostage who believes it is necessary for survival that he betray the responding authorities. He, in effect, passes over to the side of the hostage-taker in the furtherance of his criminal objectives.¹²² Are such acts of self-help to be treated as legitimate self-defense so as to exculpate the hostage from criminal liability? Can these acts be brought under the defense of necessity, however unfavorably that may be looked upon by the legal system?¹²³

The public's sympathy and understanding for hostages is decidedly limited.¹²⁴ While an act of violence directed at the aggressor is usually comprehensible as legitimate self-defense, those other acts of self-help that give rise to conflicts involving third-party interests are regarded with much greater skepticism, although the degree of necessity in the case may be manifestly the same. Thus, it is evident that self-defense does not rest solely on grounds of necessity, from whatever perspective this might be

¹²¹ As was the case in the course of a highly dangerous hostage situation in the Texas State Penitentiary at Huntsville, Texas in 1974. See *The Carrasco Tragedy* (1975).

¹²² The matter becomes very controversial when the more obvious restraints are withdrawn, and when the victim engages in patently criminal behavior in furtherance of his captor's purposes, consciously or otherwise, in an endeavor to improve the prospects of personal survival. Perhaps the classic, and certainly best-known instance of this occurring is in the case of Patricia Hearst. See generally P. HEARST & A. MOSCOW, *EVERY SECRET THING*, (1982).

¹²³ In Wicker, *supra* note 96 at 71, we find the suggestions that "the inmates should be freed as they had only committed 'crimes of survival.'" While all but the most radical would balk at this suggestion, it is a concept that can be applied sympathetically to the case of the hostage forced to engage in illegal acts in order to survive. If we grant a "right of survival" to the hostage engaging in behavior that would otherwise be criminal in order to protect that right when all else fails, the criminal behavior must be looked at as an act of necessity. The matter would seem, in these "crimes of survival" to reduce itself to the question of whether the need is great enough to justify the harm done, and through whose eyes the matter should be viewed.

¹²⁴ While many seem able to appreciate the ordeal of the hostage during the event, few can understand its continuing effects upon the victim or can react to these with real sympathy. An interesting example is Rabinowitz, *The Hostage Mentality*, 63 COMMENTARY 70 (1977), though this was surely written with a different purpose in view.

viewed and measured.

A hostage-taking creates a crisis of social values. This hypothesis casts the whole question of hostage-rights in another light. What is displayed in this area of necessity as a defense is what Sanford Kadish elegantly called a "calculus of social advantage. . . ."¹²⁵ While the hostage, is struggling to retain his precarious hold on life, the law is engaged in a delicate balancing act of its own. In the competition of social and individual values that arises out of the act of hostage-taking, it cannot be assumed that the hostage's supreme interest in saving his own life will always reign with equal supremacy in the law. There are many others, who have present and future interests in the matter. The law protects values higher than the life of any individual hostage, and a critical study of the defense of necessity, in all its facets, exposes this very well. It is an area in which there must be much weighing and balancing, for there are no absolutes to be relied upon to guide conduct. Simply stated, the hostage does not have an absolute right to do anything to save his own life. If, the hostage *in extremis* must order the exercise of his rights according to some assumed scale of social values in order to be held legally blameless for any harm that might ensue, it is not surprising that the individuals charged with society's responses to hostage-taking should be similarly obligated. Their obligation to protect the rights of the hostage can scarcely be greater than that conferred upon the hostage when the aid and comfort of society's police powers are temporarily of no avail in relieving his predicament. Indeed, the rights which the hostage might exercise upon his own initiative may represent the high point on any social scale. It would be unreasonable to expect society to perform acts for the hostage which the law would not permit him to do for himself.

XIV. THE EXERCISE OF POLICE POWERS IN HOSTAGE SITUATIONS.

*When customary police practice constitutes a dangerous abdication of minimal law enforcement responsibilities, recourse to professional standards is not necessary. The conduct of the police is negligent on its face.*¹²⁶

A hostage-taking is not just an infringement of individual rights; it is also a breach of public order. The hostage is being used as leverage. The real object of the exercise is the coercion of those interested in the hos-

¹²⁵ Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871 (1976). Compare Leavy, *Self-Defence Against the Police*, 19 MCGILL L.J. 413, 427 (1973). "The Judge has to decide, not whether the letter of the law was complied with but whether the defendant's conduct could be supported by a social value outweighing that of breaking the law."

¹²⁶ Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 840 (1981).

tage's fate. Their response is channeled through a comparatively small group of persons guarding the public order. How these guardians conceive of their task and how they proceed in the matter of its execution is of vital importance to the question of hostage-rights.

The way in which the police power of the state is wielded is a matter of life or death for the hostage. There are prejudices that translate into actions which narrow or enlarge the expectations of the hostage. If the authorities are mandated to terminate a hostage-taking using force as a last resort, the organization of their response will be very different from what it would have been without such a restriction. The effectiveness of the response lies in its organization and the competence of the various faculties who respond to the problem. The problem is the same regardless of the state organ chosen as the instrument to deal with it. But the choice definitely influences the way the problem is approached and impresses itself on the character of the response, save in a truly insurrectionary state, where the pressures generated by internal or external war rage, and the maintenance of public order is regularly confided to a police force organized to use limited force and subject to the overriding control of the civil authorities. Behind these forces lies another, more powerful organ of state power: the armed military forces. These forces safeguard the structure and operations of the state from those incursions that its ordinary police forces are unable to control. When these reserves are brought into play, the rules governing their deployment and responsibilities differ from case to case, and from nation to nation. In the 20th century some states have become accustomed to the police power of the state being effectively exercised by the military; public order is maintained by means of armed force.¹²⁷ Other states are organized in a way which make the employment of military forces to control and contain internal disorders a difficult and infrequent measure.¹²⁸ There is much more than a difference of style involved in these two examples. Military rule tends to produce military solutions, and these are generally seen as the application of force to overcome the opposing force. Therefore, in those parts of the world where military rule prevails, either temporarily or over an extended period, responses to hostage-taking can be expected to take a military slant.

¹²⁷ Colombia is a good example. While ostensibly under the rule of a regularly elected civilian government, for the last four decades it has been under a permanent State of Emergency. As a result, the nation's armed forces have been, essentially, the ultimate arbiters of law and order.

¹²⁸ This is the case with respect to the United States. See NAT'L ADVIS. COMM. ON CRIM. JUSTICE STANDARDS AND GOALS, DISORDERS & TERRORISM § 5.12 (1976). An army military force, such as *Delta*, is organized with a view to its deployment overseas in the interests of the protection of United States nationals and not for employment in assistance of regular United States law enforcement agencies coping with domestic hostage-takings, even though these are protagonized by foreign terrorists.

Even those countries whose military forces are more or less firmly under the control of a civilian administration face the dilemma of force posed by a hostage-taking. For the most part, the dilemma is resolved by reposing in the civilian law enforcement apparatus the necessary authority to make the appropriate armed response. The effectiveness of such forces to respond to the demands made upon them largely depends upon the exigencies of the times, and how well the responding authorities have prepared for these eventualities. At the beginning of the 1970s, there were few civilian law enforcement agencies in the world trained and equipped to respond efficiently to any kind of serious hostage-taking. The debacle of the Munich Olympics is evidence to this fact. Even purely military forces would have been hard pressed to perform adequately under these unfamiliar and unfavorable circumstances since the requisite forceful response was imperfectly understood.¹²⁹ In contrast, by the end of the 1970s, many countries had organized, trained, and equipped special forces of a strictly military or para-military character capable of intervening to terminate hostage situations where their own nationals might be exposed to such dangers. Thus, there is scarcely a jurisdiction within the United States that does not have some accessible specially trained and equipped law enforcement group on call to respond to hostage-taking incidents. Under a variety of forbidding acronyms, these highly mobile, heavily-armed units are now well known throughout the United States on the federal, state and local levels.

The existence of such specialized, para-military-response units has had a significant effect upon law-enforcement thinking and upon police practices generally.¹³⁰ Perhaps the main difference from what was done formerly lies in the organization of the response. Personnel are trained and equipped to respond in a regular, systematic way. There is an impressive degree of control and discipline. There is also a pride that comes both from the specialization and from the undoubted successes that the new system has brought. This new police professionalism has also given rise to different expectations of performance in handling hostage-taking incidents. Practices have developed based upon what has been seen to

¹²⁹ For some interesting insights into the way some of the response problems were perceived, see Cassidy, *Shanghai Experiments*, *SOLDIER OF FORTUNE* 44-47 (Apr. 1979). Many of the skills developed by the Special Forces during World War II had passed into temporary oblivion by the time of the Munich tragedy, which stimulated their revival.

¹³⁰ Former Commissioner Michael Codd of the New York City police department, which used to be known as a 'shoot-first force,' now says: "There can be no precipitate use of firepower, considering the carrying strength of the average bullet. It can travel further than the limits of where the problem exists, and is a serious danger in the crowded urban conditions under which we live." See C. DOBSON & R. PAYNE, *THE TERRORISTS* 2 (1979). Commissioner Codd was a member of the National Committee Task Force on Disorders & Terrorism.

produce successful outcomes. Under the stimulus of events and the responses to them, a new concept of policing has been born and is well on the way to achieving a certain maturity despite its tender years.¹³¹ Most importantly, the better practices are showing definite signs of hardening into standards for the measurement of police performance in hostage-taking incidents.

It is not only in the organization of the means and methods of deploying armed force that these developments are to be noted. The police response in other areas has been similarly systematized to the point where certain expectations are raised concerning both policies and performance. While what has taken place in this regard has been on a smaller scale and has not always been enthusiastically pursued, large and small police forces throughout the United States have developed a significant negotiating capacity.¹³² This has been encouraged and materially assisted by the Federal Government, in large measure through the efforts of the Federal Bureau of Investigation. It is, perhaps, more difficult to measure a police department's capacities to provide adequate and efficient hostage negotiation services than it is to evaluate its capabilities in the area of the use of armed force. The qualitative elements have a more subtle configuration and the department's capacity to respond effectively may actually reside in the skills and performance of a single individual. The movement toward the nationwide development of an adequate negotiating capacity within the law enforcement community has been a slow process that is still far from complete. The concept of hostage negotiation has been sold hard since it is still largely antithetical to many influential police officers, notwithstanding grudging admissions of its utility.¹³³ While

¹³¹ Standards tend to have been set in the United States by the performance of the more prominent of the major city police agencies. Information about these practices has been disseminated through professional exchanges and training seminars such as those conducted by the FBI Academy and, formerly, under the auspices of the LEAA and the International Association of Chiefs of Police. How far the smaller agencies measure up to these emerging standards has not, so far, been the subject of serious study. There are increasing prospects of the matter being determined in civil litigation.

¹³² It is not easy for small police agencies in jurisdictions where hostage incidents are an infrequent occurrence to make what amounts to an extraordinary commitment of resources to something as exotic as hostage negotiation. The developing of the requisite experience in smaller agencies is no easy matter and it is not difficult to see how it might be neglected in favor of more urgent priorities. See generally Mirabella and Tredeau, *Managing Hostage Negotiations*, THE POLICE CHIEF 46-47 (1981).

¹³³ See, e.g., Whittemore, *How Police Hostage Squads Avert Bloodshed*, The Washington Post, Jan. 4, 1976, (Magazine) at 70, 72. Whittemore quotes Lt. Klapp of San Francisco: "It's not unanimously accepted in the profession. There are still a lot of people who just don't believe in it. The philosophy challenges some basic, traditional police precepts such as 'We don't sit and let anybody dictate our circumstances' because it does involve sitting and waiting - two weeks, if need be - to preserve the safety of the hostages." *Id.*

there has been a significant increase in the capacity to negotiate with trained personnel working toward carefully thought-out and fairly uniform guidelines, the practical relationship of this police function to the armed forces remains unsettled. In some police jurisdictions, the use of the police negotiating capacity is given a primacy that has made it the preferred response to every hostage incident. The event is contained by the use of armed force, but a conciliatory approach through a hostage-negotiation team is attempted from the outset, usually with no preconceived notion of when such an approach might be changed other than by reference to the safety and well being of the hostages.¹³⁴ While the matter remains controversial, many departments have a policy providing that negotiations will be broken off and the operation will move to an assault phase if a hostage is physically harmed by the hostage taker. In other jurisdictions, the police negotiating capability, however efficient and successful is regarded as ancillary to the agencies' tactical response forces and it is a secondary rather than a primary operational option.¹³⁵ The difference in emphasis does not just influence the role and performance of the negotiator; it changes the whole character of the operation.

While the U.S. law-enforcement community's overall capacity to respond to hostage-taking incidents through negotiation rather than through the use of force has increased sharply over the last few years, there remains considerable differences about the manner and conditions of its employment. In some departments, an unfortunate operational as well as philosophical schism has developed between those engaged in conflict resolution through negotiation and those who seek to rescue the hostage by more forceful means. Which approach shall prevail is not always determined by the merits of the technical case. For the latter, is indeed, difficult to argue conclusively to the satisfaction of the proponents of either side. The law-enforcement community at large remains curiously ambivalent on this issue.

Police forces throughout the United States generally agree that an

¹³⁴ There is a sensible tendency to play most of these situations "by ear" and to leave the operational details to the police commander on the scene. If he is experienced in these matters, this is a wise course. But many incidents of an unusual nature have a potential for command conflicts that not only severely test the capacity of those engaged, but can gravely jeopardize the interests of the hostage(s). For this reason, the Task Force on Disorders & Terrorism devoted much attention to this emerging problem. See NAT'L ADVIS. COMM. ON CRIM. JUSTICE STANDARDS AND GOALS, *supra* note 128, at §§ 6.14, 6.15, 6.16.

¹³⁵ There has been a considerable reduction in funds available to police agencies resulting in a substantial cut in specialized services and training. This has had a marked impact upon the response capabilities of many police agencies in the United States. The literature with regard to the organization and deployment of those responses does not yet reflect these tendencies and the point may be most material where it is sought to establish standards, for example, in a negligence suit concerned with hostage rights.

efficient hostage-negotiating capability should be developed so as to be available when it can be productively employed. But there is still considerable doubt, and much argument, about when negotiation would be the productive method. Negotiation does not always lead to a better outcome than the use of force; one proceeds by intuition and experience in these matters, but the hidden variables are many, and often unpredictable. There is, however, an unarticulated feeling that the police agency should be equipped to offer the response that seems the most likely to those in charge of the on site operations to succeed. If negotiation is the best way to proceed, then an adequate capability to engage in negotiation according to the present standards of performance should be available. It would be considered a deficiency if such a capability had to be improvised, using officers unfamiliar with the best psychological and other techniques of negotiating or unable to communicate effectively with the hostage-taker. No police department in the United States would assert today that it did not believe in hostage negotiation as a means of safeguarding lives and trying to win the release of hostages.

XV. QUANTIFYING NEGLIGENCE

Negligence is not an easy concept to define. It is the product of measuring an action or inaction against standards constructed from observations of the behavior of others deemed to have acted in a legally satisfactory way. Thus, we have a standard of measurement defined by reference to the appropriate behavior of the reasonable man, the reasonable doctor, and now, even the reasonable FBI agent.¹³⁶ This is the standard of behavior others ought to conform to if they are to be held to have adequately discharged their duties. These standards of behavior are sometimes set *a priori* and are ascertainable by reference to documented evidence concerning the way things are done or should be done.¹³⁷ At other times, measurement of the negligence standard is an *ex post facto* exercise which is the product of litigation. For the present purposes, this article is concerned with what police response is owed to a hostage. Have practices in the United States become so standardized that the reasonableness of responses can be deduced from what is actually done in the daily course of handling hostage incidents? Are some practices now so favorably looked upon or regularly followed by the law enforcement community

¹³⁶ This is the creation of *Downs v. U.S.*, 382 F. Supp. 713, 752 (M.D. Tenn. 1974). "Thus, the standard in this case is the reasonable FBI agent." This case will be discussed in detail later.

¹³⁷ Thus, the FBI, some other federal agencies, and a number of police agencies have written guidelines serving to orient the operational behavior of those involved in hostage incidents. But many agencies and police departments do not, and, in any event, there is no uniformity of criteria or language.

that to depart from them would be to depart from the generally accepted standards of the police in these matters? Is there a positive duty owed to the hostage by those in whom the public response function is vested?¹³⁸ These questions are of equal concern to the hostage whether he is the victim of political extremists or of a frightened bank robber. This duty is the same, too, whether the responding unit of government is a federal agency, such as the FBI, or a state or local police force. Whether the answers are the same is a matter requiring more detailed attention.

A. *Liability of Police Agencies*

Hostage-taking, like terrorism, is a cyclical activity.¹³⁹ Despite the level it has reached in recent years, the management of a hostage-taking situation remains a novelty for some police agencies. Others have come to treat the occurrence as an almost everyday, incidental police function. Those who have handled a great many hostage incidents are generally among the better performers, if merely because they have necessarily learned from their own mistakes. These experienced police agencies have well constructed, clear policy guidelines and specially organized and trained units to implement the policies developed. Command, control, and coordination can all be expected to reach a satisfactory or superior level. These police agencies are ready to respond to any type of hostage situation without its management imposing too great a strain upon their resources. But there remain thousands of other police agencies, some relatively large, where the response capability cannot measure up to these levels of performance. However, great strides have been made in the pooling of resources, and many smaller agencies are now parties to agreements that enable them to draw rapidly upon the experience and skills of better endowed partners. Still, such advances are patchy and many police agencies are well into a serious hostage-taking incident before they become aware of their own deficiencies and the help that is available elsewhere. By the time such assistance can be made available to the particular agency, the tone is already set, the potential for practical and ideological conflict has arisen, and valuable time has been lost. The law in this area is in a somewhat sorry state, for there is no standardization of what type of police response a hostage is entitled. It is little comfort to the average hostage to be reassured that his rights will be suitably determined, post-

¹³⁸ It has been observed in Canada: "One wonders why the Police Force has bothered to train a special team of negotiators for the "crisis situation" if they are not made use of in these situations." Abraham, Field, Harding & Skurka, *Police Use of Lethal Force: a Toronto Perspective*, 19 OSGOODE HALL L.J. 222 n.102 (1981).

¹³⁹ In the United States, such a peak was reached in February 1977 with 10 significant events occurring in a 12 day period. The cycle changed, shortly thereafter, as abruptly and inexplicably as it had begun.

humously or otherwise, after the fact. Response is an important determinant in that prospect of survival. As matters stand, the hostage has a decidedly better chance of survival in some places than in others.

Despite these uncertainties, the legal community in the United States, is not operating in an entirely lawless area. Police practices are increasingly coming under review by the courts¹⁴⁰ and the problems arising out of the organization and direction of the police response to hostage-taking will give rise to substantial litigation in the future.¹⁴¹ There is clearly much to occupy the lawyer in this process, for it is certain that those hostages who feel their rights have been violated will look to those who should have protected them for indemnification. Those in whom the police power resides need to think carefully how their own positions might be affected by these developments. What is likely to be expected of leaders of police forces by the courts? To what standards of performance are they likely to be held? How are these standards to be derived? How do individual agencies measure up to these emerging standards? More importantly, what is all this going to cost? Today, it would be an incompetent agency that gave no consideration to these matters, or waited until some precipitating event gave rise to litigation. Police agencies, their insurers, and the superior civil authorities will consider these issues more as time passes. Whether such an agency will be held negligent will depend not only on how it has acted or failed to act in this area of hostage-rights, but also on how well the agency has prepared itself to act in what might be a rare and extraordinary event. Hostage-taking, like lightning, can strike anywhere. It has now become, unfortunately, a phenomenon of sufficient occurrence to demand adequate preparation everywhere. Hostage-rights should not be less protected in some parts of the United States than in others simply because hostage-taking occurs less frequently in some jurisdictions.

The police officials have an especially onerous burden to bear in hostage-takings as contrasted with kidnappings where the victim is hidden from view. The scope for private intervention in these confrontation-style hostage-takings is very slight indeed, and where it is possible at all, it is allowed only under the supervision of the responding authority. The pub-

¹⁴⁰ The position in the United States is probably exceptional in this regard. It has been said, for example: "Civil actions do not seem likely to develop significantly in Canada as a means of testing the legality of police conduct." Abraham, *supra* note 138, at 234.

¹⁴¹ "Courts would measure police conduct against standards embodied in statutes, ordinances, and internal police regulations. For conduct not governed by such positive rules, expert witnesses would provide evidence for professional standards and practices." Note, *supra* note 126, at 889. But, it has been suggested, "there can be no expert testimony where there is no settled body of knowledge." P. Meyer, *THE YALE MURDER* 302 (1982). It should be noted, however, that the latter observation concerned psychiatric testimony in criminal trials.

lic officials must strike the appropriate balance of interests in designing its policies for the management of hostage-taking incidents and it must assume responsibility for its agents in the practical implementation of those policies. Private intervention must be discouraged or brought under firm control, not only on grounds of operational efficiency, but in the interests of the proper maintenance of public order. There can be no debate about the exercise of the police function in the middle of the action, although in the case of a protracted event, it can be expected that public concern will manifest itself in influential ways.¹⁴² While tactics used by the police against hostage-takers can be kept from the public view, there is a real question of whether this protection can extend to the policies and guidelines that inform those operational modalities. The public is entitled to know what to expect in these matters. For example, if a police authority were to institute a policy of no negotiation with hostage-takers, the public is interested in knowing this before such a policy is put to the acid test. Hostage-takings take place under the close scrutiny of the media. It behooves every policy authority, therefore, to ensure that its policies and the implementation of those policies will stand up to such scrutiny. Secrecy, and a defensive posture are not only operationally unsound, but are likely to prove counter-productive.

Finally, one must inquire what standards of accountability are levied upon civil authorities and law enforcement agencies by reason of the exclusive responsibilities they have assumed or which have been imposed upon them by the circumstances. As the laws have developed in the United States reliance will be placed on the general rules governing the law of negligence. For a number of reasons, it can be anticipated that many who have potential claims arising out of the management of hostage incidents will try to bring their actions in the United States whenever this course is open to them.¹⁴³ Therefore, the standards of accountability in these cases will be those set by courts of competent jurisdiction and will follow general negligence principles except where a wilful wrongdoing is

¹⁴² In those totalitarian and near totalitarian societies that do not ordinarily account to anything in the nature of a "public," excesses in the use of police power can be expected. For this reason, the mobilization of international expressions of concern, through the proper organs, is important for safeguarding the rights of hostages who are in no position to speak out for themselves.

¹⁴³ "Yet a new development in the tort relationships connected with aerial terrorism may be expected as the result of the decision of Judge Greenfield of the Supreme Court of New York that suit could be brought by passengers and surviving relatives of passengers from Israel, France, the United States and Canada against Singapore Airlines and Gulf Airlines for their negligence in allowing pro-Palestinian terrorists on to their aircraft and permitting them to enter the transit lounge at Athens Airport without searching them, such terrorists having subsequently hijacked the Air France aircraft that was the occasion of the Entebbe rescue." Green, *supra* note 60, at 343. *Aboujdide v. Gulf Airlines Co.*, 108 Misc. 2d 175, 437 N.Y.S.2d 219 (N.Y. Sup. Ct. 1980), *aff'd*, 448 N.Y.S.2d 427 (N.Y. App. Div. 1982).

found.

Police responses to hostage-takings are largely reactive; hostages are taken and the police respond to the event with whatever resources, material and intellect they are able to dedicate to its control and management. Further, police have little or no choice in the matter of whether they will respond. The circumstances, if not the law require them to do so, and their response is often exclusive. Police must, therefore, both respond and be prepared to respond appropriately. It can be expected that great emphasis will be placed by the courts upon preparation, in view of the foreseeable character of the response. Those acting in a public capacity must be held accountable to a much higher standard than a private individual. Having opted to act in certain ways, the police must act with due care in the matters where they are engaged. What is reasonable and what is foreseeable, in the light of the goals sought, will be of considerable importance. For example, assaulting a heavily protected building in which hostages are held by armed individuals can be expected to have certain negative results. The following questions will be asked of those making the decision to assault: Was this the act of a prudent commander? Was the result foreseeable? Was an assault reasonable in relation to the prospects of success weighed against the attendant risks?

Hostage-rights may not yet be defined with the clarity some would like, but they are being increasingly recognized. While the courts are unlikely to second-guess policymakers and field commanders in the proper exercise of their discretion, they will certainly look most carefully at standards of performance and the selection, by decision-makers, of the priorities they have chosen to pursue.¹⁴⁴ In the United States any strategies that emphasize priorities other than saving the life of the hostage will come under very hard scrutiny.

A. *The Potential Plaintiffs*

*Encounters with death and danger are only adventures to the survivors.*¹⁴⁵

Being taken and held hostage is an emotional experience that most persons dread. In its more extreme and protracted forms, hostage-taking

¹⁴⁴ Regarding the Munich tragedy, Lillich and Paxman opined: "Liability would certainly exist in this case if the German authorities actually acted in the wholly reckless manner that has been suggested." Lillich and Paxman, *supra* note 34, at 248. See also n.112, at 249. The action taken was clearly within the discretion of the police authorities concerned and seemed both right and reasonable to them at the time. It is doubtful if any German court could have found the action grossly inappropriate. It is hard to accept the view that the German authorities acted in a wholly reckless manner and it would have been difficult so to persuade even an international tribunal.

¹⁴⁵ MASKS OF THE ILLUMINATI 195 (1981).

brings suffering and trauma that are severe and long lasting. For most hostages, there is nothing heroic about the experience. It is enough that they have persevered without having to do anything that might leave them with an enduring sense of shame. Nearly everyone would be content to echo the words of the French aristocrat, Emanuel Joseph Syès, who, when asked what he had done during the Great Terror of the French Revolution replied, "I survived."¹⁴⁶ Even in the most spectacular cases, the hostages' adventure has a short-lived appeal for the public at large. After being the centerpiece of a media carnival, the hostages are quickly thrust into obscurity once their adventure has concluded.¹⁴⁷ While this may be deflating to the more exhibitionistic persons, most hostages are genuinely relieved to be out of the unwelcomed spotlight and are anxious to pick up the threads of their daily lives as quickly and anonymously as possible. This, as many have found, is not an easy process. The experience remains with the hostage in curious, persistent and unpleasant ways.¹⁴⁸ Relatively few of those taken hostage are public figures. They are usually ordinary people caught by circumstances outside their own control in an event that has little meaning for them outside the pain and suffering it has brought into their lives. While a few might seek personal gain by retelling their experiences, most quickly realize that once the episode is over their plight has very little commercial value. Most are persuaded, quite quickly, that the most beneficial therapy is to forget the adventure. While this is often a more cosmetic than real process, they prefer it to a constant, recurring memory of unpleasantness.

Some survivors take a different view. They have suffered; and someone, somewhere shall pay. A few are embittered that the concern poured out over their plight while a hostage should evaporate so quickly once they are released without compensation for their suffering.¹⁴⁹ In some cases, the hostages themselves perish in the course of the adventure, leaving behind survivors who are stunned, bewildered, and embittered by the

¹⁴⁶ R. NIXON, *THE REAL WAR* (1980). This work contains, incidentally, invaluable advice for the negotiator. The same words, were used by Niehous, *supra* note 37, at 51.

¹⁴⁷ For more than a year, news of the U.S. Embassy hostages in Tehran dominated the media. The American public was bombarded daily with items designed to keep concern at fever pitch. The public was encouraged to send mail to total strangers. Where is that concern today, for individuals who, are now no longer known by name?

¹⁴⁸ For the type of consequences that might be anticipated from having been subjected to a prolonged hostage experience, see the plaintiff's statement of claim in *Rosman v. Trans World Airlines, Inc.* 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1976). The hostages, whose claim was being adjudicated, had been skyjacked on September 6, 1970 by the PFLP and conveyed with many others to an airstrip in Jordan, where they were kept for six days in the desert under severe conditions and forced to witness the destruction of the aircraft before being moved from the scene to the release site.

¹⁴⁹ See, e.g., Mathewson, *The Terrorists: Bitterness Surrounding Dutch Train Hijacking Lingers a Year Later*, Wall St. J., Jan. 6, 1977, at 1, col. 1.

loss. These are the potential litigants who would seek redress for the harm they have experienced. It is to this group that the legal community must look to for the future definition of hostage-rights, as their pain, suffering, and loss are translated into terms comprehensible and acceptable to the courts.

B. Finding a Defendant

Litigation may represent a process of catharsis for some. For others, the experience is as frustrating, time-consuming, and annoying as the hostage-taking itself. Litigation can rarely be considered profitable, or even fair compensation, in cost-benefit terms. Therefore, it is not surprising that there are few decided cases and those of real significance are more scarce.¹⁵⁰ The belief that this experience might be converted into a bonanza ought not to be encouraged. Compensation, even where it is obtained, is rarely very generous. First, there is the problem of whom to sue. There is rarely any point in suing the hostage-taker or his superiors, where these are identifiable.¹⁵¹ It is a constant source of grief that political extremists who take hostages should be so well endowed with funds that cannot be attached in any practical way. Except as a token gesture, little purpose is served in bringing suit against the hostage-takers even where these have been reduced into the power of authorities who would be willing to permit an action against them. As a practical matter the choice of whom to bring an action against is restricted to three groups: 1) The government entity responsible for ensuring that the hostage-taking did not occur and who were remiss in their duties in allowing it to happen; 2) those who intervened in some way in the management of the incident that was harmful to the protected interests of the hostage; 3) those persons not acting in an official capacity, who can be considered to have owed some duty of protection to the hostage, the non-fulfillment of which occasioned him harm. These classes are not extensive in relation to any particular event, and there are built-in limitations that effectively narrow the range of possible defendants. First, finding someone to sue is not easy. Second, finding someone, to whom the wrongdoing can be imputed

¹⁵⁰ A great many actions are brought and settled, after varying lengths of time, without ever being entered in the legal literature. As in other areas of the law, the most controversial cases will generally reach the courts.

¹⁵¹ It has been said: "Theoretically, a passenger could institute an assault or battery action against a hijacker." Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFFALO L. REV. 341 (1971). But, it has also been realistically observed: "Victims of airport terrorist attacks do not have many promising avenues of tort recovery other than negligence. It hardly need be said that any attempt to recover directly from terrorists for their intentional torts is likely to be fruitless." Comment, *Deterring Airport Terrorist Attacks and Compensating the Victims*, 125 U. PA. L. REV. 1159 (1977).

who cannot legally shield himself, is even more difficult. The future of hostage-rights is, therefore, likely to be found in the interstices discovered by determined litigants and their legal advisers.¹⁵² These are not likely to greatly increase in numbers or size in the future. However, it is probable that these narrow gaps will be made to bear a greater amount of traffic.

C. Choice of Forum

The choice of forum is as difficult a question as the choice of defendants. Many legal and practical problems must be confronted before any choice can be effectively exercised. Practical problems are often the most forbidding. Even those litigants with crusading zeal born out of the hostage-taking adventure can be expected to pause before some of the formidable obstacles they must surmount to be able to bring their cases. Even where a foreign country is receptive to an action being brought in its courts, the physical problems of distance, the time involved in pursuing the claim with lawyers and witnesses, and the language difficulties must be discouraging enough for most hostages. But the most telling argument against litigation in a foreign court with jurisdiction over the matter is purely economic. Few hostages have the financial resources to subsidize costly and lengthy litigation. Even should the suit prove successful, the rewards are very unlikely to be commensurate with the time, energy, and money expended to secure the judgment.¹⁵³ Further, an individual must be very unsophisticated to assume that justice is dispensed throughout the world with perfect impartiality, professional competency and impeccable honesty. Only the irredeemably corrupt relish the trial of their actions in a corrupt forum. Procedural obstacles may prevent the court from reaching the merits of the case. The principle of sovereign immunity is a shield behind which many governments can be expected to take ref-

¹⁵² Those to be found negotiating their way through these gaps will not always be those having hostage rights and their definition as a primary consideration. Thus, it has been written: "This rush of plaintiffs, storming through the attachment gap in the assets regulations, threatened to undermine the United States strategy for dealing with the hostage crisis." Lambert & Coston, *Friendly Foes in the Iranian Assets Litigation*, 7 YALE J. WORLD PUB. ORD. 88, 92 (1982). Although these litigants were, understandably, more concerned with protecting their own rights, their actions had a substantial impact upon the rights of the hostages.

¹⁵³ The most likely causes of action usually arise out of unlawful interference with international aviation. Justice Stevens made the interesting suggestion, in this dissenting judgment in *Rosman*, *supra* note 148, at 859: "Even as victims of crime are compensated by local governments, nations could, and perhaps, should create and contribute to a fund to compensate victims of hijacking." An interesting sidelight on the potential for satisfying hostage rights comes from a report concerning John Wojtowicz, the real-life protagonist of *Dog Day Afternoon*. His litigation against Warner Bros. was reportedly settled for \$100,000 "but the money was impounded by the New York State Victims Compensation Board." Grossberger, *The Dog is Out of the Joint*, *The Washington Post*, Feb. 16, 1978, at B1.

uge.¹⁵⁴ Even where sovereign immunity has been waived, the litigant cannot expect to be able to question actions taken if such a proceeding simply involves substituting one set of opinions about the correct way to have managed the incident for another set of opinions. Government officials are given substantial discretion in handling these delicate matters. Their task would be impossible if their conduct were called in question every time they were unsuccessful in their honest endeavors to hold the hostage free from harm. The extent to which even the United States is prepared to seal off the courts from potential litigants in these cases is amply demonstrated in the matter of the U.S. Embassy hostages in Tehran. The hostages were affected by the terms of the agreement concluded between the United States and Iran, which led to their release in 1981.¹⁵⁵

Even though civil actions may be possible in foreign jurisdictions against government authorities, or individuals acting under color of government authority whose actions or failures to act might have resulted in harm to a hostage, the victim is unlikely to win in court. Where there is merit in a civil action, sufficient outrage in the international community and the sponsorship interest of the hostage's own governments may result in some sort of *ex gratia* settlement.¹⁵⁶ Actions against private legal persons, including corporations and other legal entities face fewer procedural obstacles, but their liabilities may be limited by law or practice which diminishes the value of the action to any prospective litigant. Given this fact, it is not unduly pessimistic to predict that cases brought in foreign

¹⁵⁴ In most instances, hostage rights are defined by executive actions taken at the highest levels of authority. Rarely will any nation allow the courts to second-guess its Chief Executive and his agents, and the United States was no exception in the Iranian hostages incident.

¹⁵⁵ From the hostages' perspective, the substantive issue was the legal validity of the agreement under which they had been released that barred any future action they might take against Iran or its nationals. It has been written: "In the end, only affirmative promises and undertakings by the United States succeeded in securing the hostages' freedom, raising the question of whether the Agreement was coerced in violation of international law." Note, *The Iranian Hostage Agreement under International & United States Law*, 81 COLUM. L. REV. 822, 825 (1981). This is precisely what the hostages are barred from showing. It is proper to uphold this agreement, whatever its wisdom, and it seems the President was within his powers to make such an agreement. Future hostages might be less fortunate in the exercise of presidential authority.

¹⁵⁶ Thus, the Government of the Federal Republic of Germany, without any admission of responsibility, promptly paid 3,200,000 DM to the families of the Israeli athletes killed. Although scarcely a generous sum, the payment was a response to international concerns and it was offered in a manner that somewhat appeased the feelings of those who had seriously criticized the actions taken by the West German law enforcement authorities which were seen as having led to the athletes' deaths. It must not be overlooked, however, that the forceful solution to the problem was in obedience to the insistent urging of the Israeli government.

jurisdictions, even the most favorable, are unlikely to add a great deal to the clarification of hostage-rights, or their practical protection.¹⁵⁷ There is a need for serious consideration of the direction of U.S. case law in order to determine the extent to which the unfortunate hostage (or his heirs or assigns) might be compensated for his unwanted adventure.

The reputation of the U.S. judicial system, its elastic procedures, the ease with which a meritorious action may be brought, the contingent fee system, and the eagerness of the American legal profession to litigate, all combine to make the United States the preferred forum for litigation. There are considerable financial inducements that are also a factor. It is likely therefore that law defining the rights of hostages will be developed in the United States. These laws will be relevant to hostage incidents within and without the territorial borders of the United States. Further, cases involving persons in domestic incidents in a private capacity, and those cases occurring in foreign countries where the litigants are able to bring their suit within the jurisdiction of the courts of the United States are likely to be brought in a state or federal court. There have been cases which suggest the direction the courts are likely to take in these matters. Given the power of precedent, the future power will be a fairly recognizable extension of precedent.

D. Liability of Government Officials

The liability of government officials in connection with the management or mismanagement of hostage-taking incidents involves the liability of the federal, state and local police. The litigation generated thus far cannot be appropriately evaluated in terms of decided cases since a great many cases that might have made good law were settled before trial. The astronomical sums claimed in damages in these cases rarely bear any recognizable resemblance to the settlements. Yet the temper of opinion in the United States has been to impose increasingly high standards upon public officials who intervene in hostage-taking events. The prospects of recovery must be considered quite high in cases where the hostage has been harmed through mismanagement of the incident. Given the prevailing climate and the likelihood of its continuance, an increase in litigation resulting in more generous settlements is predictable. This may not lead to open season on the police, but the law enforcement community can certainly expect to find itself under increasing pressure, especially if certain principles, foreshadowed in practice, become hard law through the

¹⁵⁷ France may be an exception. See, e.g., Carboneau, *Terrorist Acts - Crimes or Political Infractions? An Appraisal of Recent French Extradition Cases*, 3 HASTINGS INT'L & COMP. L. REV. 265, 295 (1980). From the perspective of the hostage, the attitude taken in these cases is encouraging. See also Haddad v. France, Tribunal de Grande Instance de Paris, April 28, 1978, reprinted in III Air L. 180 (1978).

decided cases. The most threatening litigation is likely to develop mainly in the area of the police agency's reactive responses to hostage-taking. It is unlikely, however, that much official responsibility will attach for failing to prevent people from being taken hostage in the United States.¹⁵⁸ Whatever responsibility arises in this regard, it is more likely to be found in private individuals and corporations.¹⁵⁹ "Courts have generally shielded law enforcement agencies, officers and their employer governments from tort liability for failure to provide reasonable protection against crime."¹⁶⁰ Absent any specially assumed obligation in particular cases, the principles enunciated in that observation are certain to apply to the crime of hostage-taking. Others who act in a private capacity to contract to provide personal protection, or even those who offer advice on the matter, may find themselves in a less enviable position if they do or fail to do something that results in their charge being taken hostage.

The leading case that commands attention in the matter of law enforcement responses to hostage-taking, *Downs v. United States*¹⁶¹ will determine the future liability of law enforcement agencies and officials in the United States. The judgment contains some acute and sensitive observations on police practices and the complexities of the hostage-taking scenario.

The *Downs* case was brought under the Federal Tort Claims Act and, although much of the judgment is concerned with interpretation and application of that statute, the decision has a much wider substantive relevance. While the District Judge was reversed on his finding that the government agent was not negligent, he was commended "for his sensitive handling of the case and his thorough statement of findings and conclusions."¹⁶² The suit arose out of an incident of air piracy that occurred on

¹⁵⁸ Law enforcement authorities cannot reasonably be held to owe a general duty of care in this regard to all those within their respective jurisdictions. Such a burden could be unrealistic to impose. However, special protection may be extended to high risk targets and the police in these cases have the obligation to act with due care. It has been ruled that "where a municipality assumes a duty to a particular person or class of persons, it must perform that duty in a nonnegligent manner, notwithstanding that absent its voluntary assumption of that duty, none would have otherwise existed." *Florence v. Goldberg*, 404 N.Y.2d 583, 587 (1978).

¹⁵⁹ Many in the private sector have voluntarily assumed the burden of trying to see that others are not taken hostage such as the suppliers of and the purveyors of armored vehicles and other security hardware. Others, such as airline companies in particular and banks, have special obligations imposed upon them due to the nature of their enterprises and the risks of being taken hostage in the ordinary course of doing business. It is suggested that they owe a duty of care to the classes they serve although the nature and extent of that duty will vary from case to case.

¹⁶⁰ Note, *supra* note 126, at 821.

¹⁶¹ *Downs v. United States*, 382 F. Supp. 713 (M.D. Tenn. 1974).

¹⁶² *Downs v. United States*, 522 F.2d 990, 1006 (6th Cir. 1975).

October 14, 1971. The hijacker, a male armed with a handgun and claiming to have a quantity of explosives, took control of a chartered twin-engine aircraft in Nashville, Tennessee. He held his estranged wife, a male associate, the pilot, Downs and a co-pilot as hostages, and the plane proceeded toward the Bahamas. The aircraft, by then known to have been hijacked landed for refueling at Jacksonville, Florida where agents of the Federal Bureau of Investigation were waiting. The case is largely concerned with what these agents did in an endeavor to terminate the skyjacking; actions which resulted in the perpetrator killing the pilot, his estranged wife, and himself.

The facts of the case are graphically recounted in the judge's opinion and no summary can do it real justice. The minute by minute account of the confrontation between the government agents and the skyjacker must be read in its entirety to capture the flavor of the tense scene and the difficult decisions that had to be made. James J. O'Connor, the Assistant Special Agent in charge of managing the event, made the fateful determination, over the urgent pleas of the captive¹⁶³ pilot, not to permit the aircraft to refuel or take off from Jacksonville. The judge found that this agent had contravened his own agency's guidelines, but that this action of itself, was insufficient for a finding of negligence. The judge concluded that Agent O'Connor's conduct was not an unreasonable response under the circumstances. The Judge stated:¹⁶⁴

In traditional negligence terms, O'Connor was under a duty to choose a course of action which would maximize the hostages' safety, and to attempt a capture of the hijacker only if possible by means compatible with the greater interest. While the FBI obviously cannot undertake to guarantee the safety of persons in this situation, the means employed to effect any capture should be consonant with that which would provide the maximum assurance possible that hostages would not be harmed as a result.

The court took the charitable view that the proper decision in the situation was a matter on which reasonable minds could differ; hence the finding that the course adopted by the FBI agent was not unreasonable.

The Appeals Court found the District Judge's position on the negli-

¹⁶³ Captain Downs had *power* (unless he shut down his engines), but he lost his *authority* once the FBI assumed charge of the incident. See M. West, *supra* note 18. This point has considerable importance where the hostage seized has, and indeed may have been seized because he has ostensible authority. See, e.g., *United States v. Bridgeman*, 523 F.2d 1099, 1105 (D.C. Cir. 1975): "This time Wren had to explain to the inmates that by Department of Corrections regulations hostages lost all authority" Once Downs had complied with the FBI order he was, effectively, deprived of his only means of self-help.

¹⁶⁴ *Downs*, 382 F.Supp. at 755.

gence issue to be clearly erroneous.¹⁶⁵ The Court said: "There did exist, from foresight, 'a better-suited alternative to protecting the hostage's well-being. That choice was not to intervene forcibly but to continue the waiting game.'"¹⁶⁶ The Court observed that:

Agent O'Connor was trained to handle dangerous situations. He must be held to the standard of the reasonable FBI agent with training in handling such affairs. Indeed, although O'Connor himself had not previously been involved in handling a hijacking, he was familiar with the FBI Handbook's guidelines and the Jacksonville intra-office memorandum on hijackings. While these documents must be kept secret, it is significant that they place a far greater emphasis on hostage safety and pilot cooperation than O'Connor did in confronting his problem. . . . The District Court framed only two action alternatives as having been available to O'Connor: (1) the forcible termination chosen by O'Connor or (2) acquiescence in the aircraft's departure. We believe that additional delay and an attempt to reason with the hijacker were other options that were open to O'Connor, and these options were particularly proper in view of the pilot's insistence that armed intervention would result in disaster. We believe a reasonable FBI agent would have tried additional delay and would have ordered an attempt to reason with the hijacker. By the timing of his decisions, O'Connor backed the hijacker into a corner. Force or immediate surrender became the hijacker's only options. Special Agent O'Connor grossly miscalculated in assuming the hijacker would respond peacefully to a show of force.¹⁶⁷

In the Court's judgment, a pivotal point was the lack of exercise of the highest degree of care by the law enforcement officer commensurate with all facts within his knowledge. This part of the decision has far-reaching implications for all law enforcement officers. These principles will be taken up, refined, and elaborated upon, and used in many future cases where the judgment of police officers in handling a hostage incident is questioned. Certainly, *Downs* goes a long way toward defining what hostages might expect as an appropriate police response to their predicament.

E. Liability of Private Actors

In 1980, a decision of major importance to the private sector was handed down in the United States District Court for the Southern Dis-

¹⁶⁵ *Downs*, 522 F.2d at 999. "The rule in this Circuit is, however, that a finding of negligence or the absence thereof will not be set aside unless the District Court's determination is 'clearly erroneous' under Rule 52, Fed. R. Civ. P."

¹⁶⁶ *Id.* at 1002.

¹⁶⁷ *Id.* at 1003.

trict of New York. *Curtis v. Beatrice Foods*¹⁶⁸, a case brought by a survivor, is likely to serve as a prototype for similar suits in the future, although the plaintiff in this case was not successful. Gustavo Curtis, who was joined by his wife in the action, was manager of Industrias Gran Colombiana, S.A., an industrial company incorporated in the Republic of Colombia and located in Bogota. He was kidnapped on the streets of that city by political extremists and held for ransom in a 4' x 8' subterranean cave cell until May 17, 1977, when he was released by his captors. The original ransom demand for \$5,000,000 was well beyond the ability of the victim or his company to pay. Beatrice Foods Company, a multinational enterprise incorporated in the State of Delaware with its principal place of business in Chicago, Illinois, was the parent company through stock ownership of the entity which employed Mr. Curtis as manager. Beatrice Foods was informed of the kidnapping within hours of its occurrence. That company had an arrangement with Control Risks, Ltd. of London, England, probably the most experienced organization in the world in dealing with kidnapping matters. Beatrice Foods promptly retained Control Risks, Ltd. to negotiate the release of the victim, although the corporation had no direct contractual relationship. Control Risks, Ltd. secured Curtis's release for \$465,000; less than 10% of what had originally been demanded, and a little over a third of what had recently been paid in the same location to secure the release of a kidnapped Sears executive. Notwithstanding this successful outcome, Curtis brought suit against the defendants soon after his release. He claimed damages in excess of \$200,000,000. Curtis asserted that Beatrice Foods, as his employer, was liable to him for monetary damages under provisions of the Labor Code of Colombia, similar to U.S. Workmen's Compensation laws, for a "work accident." He claimed in the alternative that Beatrice Foods became an "officious agent" by volunteering to secure his release and was liable to him for having inadequately performed the functions of that agency. Mrs. Curtis filed claims for loss and impairment of consortium and alleged defamation for doubting that the kidnapping was genuine.

A number of background points are worth interpolating. The kidnap victim was well aware of the dangerous milieu in which his business activities were conducted. When he moved from Venezuela to Colombia in 1969, Curtis had already spent a substantial part of his adult life living and working in Latin America. Therefore, he must be presumed to have discounted the extremely disturbed conditions that had prevailed in Colombia for more than 20 years.¹⁶⁹ He was no ingenué, but a man of good

¹⁶⁸ *Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1275, (S.D.N.Y. 1980), *aff'd* in 633 F.2d 203 (1981).

¹⁶⁹ *La Violencia Colombiana*, which began in 1948, was notorious throughout Latin American and much of the the world. For the endemic nature of this phenomenon, see

physique and presence who in his early years had served in the U.S. Army in the Phillipines. Moreover, the personal dangers the victim faced were more apparent when, shortly before he was kidnapped, an official of the U.S. Embassy in Bogota showed him evidence suggesting he might be a potential kidnap target. While he does not seem to have dismissed this lightly, Curtis did not take the precautions his situation would have warranted and which his virtual autonomy as manager of his organization would have allowed. It did, however, provide the stimulus for him to approach the upper management of the parent corporation and attempt to secure a transfer to a less dangerous position within that organization. At that time Beatrice Foods had no openings for Curtis in any other country and perhaps this fact and subsequent developments generated the genesis of the suit eventually filed against the parent company. Curtis had some background on the problems of kidnapping, although it can hardly be called training; he attended a security briefing in fall 1975 in Monaco, and another in early 1976 at the U.S. Embassy in Bogota. Following the warning in early July, 1976, the only practical course open to Curtis would have been for him to leave his employment and voluntarily withdraw from the country. When asked why he did not do this, he testified that he was "no quitter." His position can be viewed with sympathy by many around the world who, despite the danger in which they find themselves, are unable, for a variety of comprehensible personal and professional reasons, to quit and take up residence elsewhere.¹⁷⁰ The case raises, by implication, interesting questions of obligation with respect to those corporations that have a more direct relationship with their overseas managers than Beatrice Foods did with Curtis. Where a sufficiently tangible danger is perceived, what proper security arrangements ought to be made by the employer to safeguard the person against whom that danger might materialize in the foreseeable future? It was not enough to rely on the manager's authority and resources to take the necessary steps for his own protection. A single security briefing, even with the indication that the corporation had retained the services of an expert consultant to assist with any problems, can hardly be regarded as rendering the manager capable of attending to his own security.¹⁷¹ Finally, at this stage, would the

Schmidt, *La Violencia Revisited: the Clientelist Bases of Political Violence in Colombia*, 6 J. LATIN AM. STUD. 1, 97-111 (1974).

¹⁷⁰ Much of Mr. Curtis' peculiar value to his employers lay not in a skill that might have equal worth wherever it was displayed, but in his familiarity with and effectiveness in the rather narrow Colombian milieu in which he worked. This is the case for many who, if forced to abandon their work, would find their value, personal standard of living and esteem sharply reduced.

¹⁷¹ See *Curtis*, 481 F. Supp. at 1291, where the judge observed: "On the other hand, Beatrice had schooled Mr. Curtis in how to protect himself from the threat of kidnapping" By comparison with the lengthy, detailed and very personal risk instruction some

evidence have warranted the corporation withdrawing its manager and offering him a less hazardous position elsewhere, even though it had no need of his services in another location? These questions were not asked in this case, but they certainly will be asked in the future cases when the circumstances may demand an answer. The case also contains some other instructive asides that are worth interjecting. Beatrice Foods was wise in retaining the services of an acknowledged expert consultant whose irreproachable handling of the matter resulted in Curtis being freed on acceptable terms. Consultants have proliferated in this field in recent years, and it is not easy to probe their integrity or their competence.¹⁷² Yet there is a clear duty of care to be exercised in the choice of a consultant and the proceedings in this case show that this duty was satisfactorily discharged. Corporations would be well advised not to wait until they are in the middle of a crisis before seeking the expert assistance they may need. A most revealing passage on the duty to choose a competent consultant and associated problems is contained in the judgment and is worth citing here in full:

Another handicap that Beatrice and Control Crisis were laboring under was the hostile attitude of the Colombian authorities toward the payment of ransom. It was made manifest to defendant's representatives and to the victim's wife that *the Colombia police were more concerned about catching kidnappers than with getting the victims back alive*. The authorities made it clear that, although they would not directly interfere with negotiations, they felt that the Sears ransom had been excessive and enhanced the danger of such crime and they did not want a repetition of that kind of incentive to terrorists. In fact, after the ransom was paid, the military authorities arrested the people involved in the negotiations with the kidnappers and kept them in prison over two months for having dealt with terrorists to gain Mr. Curtis's release.¹⁷³

The Colombian authorities are not the only public officials who have adopted this attitude, or arranged their priorities in this order. Stated in this way, the no-negotiation policy constitutes a sobering check upon any enthusiasm concerning the enlargement, and better protection of hostage-rights in the world. It was, perhaps, fortunate for Beatrice Foods that the ire of the authorities was directed at the agents of the independent con-

corporations have seen fit to program for their executives, Mr. Curtis can hardly be said to have been "schooled."

¹⁷² For obvious reasons, those who engage in this somewhat precarious business do not advertise, and often affect an exaggerated confidentiality that prevents serious investigation of their *bona fides*. Reputable consultants, with a track record upon which to stand are generally able to overcome these inconveniences to satisfy appropriate inquiries. It is doubtful if those engaging the services of such intermediaries could be held to have acted with due care if they refrained from making the appropriate enquiries.

¹⁷³ *Curtis*, 481 F. Supp. at 1282 (emphasis added).

sultant and not at the corporation and its subsidiary. Owens-Illinois, another multinational corporation that faced a similar problem was not as lucky, and had to bear the full brunt of the wrath of the Venezuelan authorities for taking what Owens-Illinois perceived to be necessary and appropriate action to save the life of a kidnapped employee.¹⁷⁴

The claims in the *Curtis* case were held to be governed by the law of Colombia and after conducting its own examination of the authorities provided, the U.S. court ruled that Beatrice Foods was not Curtis's employer and the plaintiff was, accordingly, not entitled to the compensation sought under the provisions of the Colombian Labor Code. It was also decided that the kidnapping was not a "work accident" within the meaning of the Code, largely on causal grounds. The court found a strong inference that the victim was kidnapped not because of his work activities but "because of what he represented—a well-to-do corporate executive with a high public profile. It was Mr. Curtis's status, not his job *per se*, that made him a chosen target of kidnappers."¹⁷⁵ Further, the court found that the kidnapping was not caused by any fault on the part of the defendant company and, indeed, the judge found this part of the plaintiff's claim "somewhat startling."¹⁷⁶ This claim is essentially based upon the argument that the kidnapping was "caused" by Beatrice Foods failing to find an opening for the plaintiff elsewhere in its organization and to transfer him out of the dangerous situation in which his position as manager of the subsidiary placed him. The judge observed that, "Mr. Curtis was not in bondage; rather he was a freely mobile sophisticated businessman who knew that Beatrice was not at his beck and call in matters of transferral."¹⁷⁷ The judge found no liability existed under the circumstances, even had Beatrice Foods directly employed Curtis and that Curtis had suffered no compensable loss under Colombian law for the kidnapping. Perhaps the most interesting theory under which the plaintiff sought to establish liability, was that, by its actions, Beatrice Foods became an officious agent under Colombian law and Beatrice Foods was

¹⁷⁴ Owens-Illinois felt it owed its kidnapped employee, William Niehous, the obligation of acceding to his captor's demands to publish a document despite a news blackout imposed by the Venezuelan government. The company was charged with defaming Venezuela by publishing the communique. On this whole, bizarre matter, see Mann, *supra* note 11, at 419.

¹⁷⁵ *Curtis*, 481 F. Supp. at 1289. This point is worthy of close attention. In many cases, the reverse is true and, although the targeted executive prudently seeks to keep a low personal profile, the activities of those by whom he is employed tend to attract the danger to him. It is the job rather than the personal life-style that is the targeting factor.

¹⁷⁶ *Id.* Although the dangers inherent in the local situation must be presumed to have been known to the parent company, they were simply under no obligation to Mr. Curtis to remove him from those dangers. His relationship to Beatrice created no duty to safeguard him in that way.

¹⁷⁷ *Id.* at 1291.

obliged to conduct itself accordingly. The rather uncharitable suggestion was made that neither the plaintiff nor their agents were using their best efforts in the case, but no such finding was made by the court. The court set out the position as follows:

At bottom, plaintiffs rely on only two points to establish that Beatrice was at fault in handling the negotiations: (1) that Sears was able to get its man out in 89 days (though at a cost of \$1.2 million) whereas it took Beatrice eight months; and (2) Beatrice had kidnap insurance and thus could have reached an agreement for Mr. Curtis' release by offering much more sooner.¹⁷⁸

The court then made an observation that has equal force when applied to publicly undertaken negotiations. "The problem with plaintiff's position is that, in essence, it asks this Court to second guess the whole negotiation process, read the kidnappers' minds, and speculate the point at which some unannounced offer would have appealed to the kidnappers in the on-going negotiations."¹⁷⁹ The court declined to do this holding that "the record fails credibly to show that Beatrice failed to exercise due diligence or breached any duty as an officious agent."¹⁸⁰

In a careful reading of this case, one cannot help feeling how fortunate the plaintiffs were and how, with but a slight adjustment of the relationship, the defendant might have found itself liable for substantial damages, although less than the amount claimed. The relevance of the case lies in the exposed position of a host of U.S. multinational corporations and subsidiaries whose executives are in equal or greater danger than that faced by Mr. Curtis and which arise, substantially, out of the situation of their employment.¹⁸¹ Many of these companies have not given a great deal of thought either to the real question of protecting their employees, or the hypothetical one concerning their liability for failing to do so.¹⁸² It is truly tragic to contemplate the frightening prospect that, had

¹⁷⁸ *Id.* at 1293.

¹⁷⁹ *Id.* at 1294. The term "second-guess" is significant in this context. It is echoed in *Sarner v. Sarner*, 62 N.J. Super. 41 (1960). "Courts will not second-guess the actions of directors unless it appears that they are the result of fraud, dishonesty or incompetence," cited in *Flick v. Exxon*, (Supreme Ct. N.Y. County, 1980) (unreported).

¹⁸⁰ *Curtis*, 481 F. Supp. at 1275. In a very real sense, Beatrice is to be commended for having acted as an "officious agent" at all in this matter.

¹⁸¹ For a palpable expression of this concern, see Godfrey, *The Case of Transnational Corporate Security*, INT'L SECURITY REV. 102-05 (1982).

¹⁸² The nonchalance of those faced with these potential liabilities is remarkable. Mann, *supra* note 11, at 437 on a training initiative: "To find 12 firms to sponsor the second phase of the Motorola project which required a commitment of just \$13,000, a participation in the think tanks and a willingness to test the products of the program in their organizations, Teleprograms had to approach 200 of the largest enterprises in the United States. Part of the reluctance may stem from a failure to appreciate the magnitude of the problem and a

Beatrice been more clear from the outset on the nature of its relationship to the plaintiff in his case, it might properly have declined to intervene on his behalf for fear that such intervention might be held against it in a court of law in the event that matters turned sour. For example, had Mr. Curtis died in captivity, the sympathy felt for the defendant company could have quickly evaporated before the contention that it could have done more, more quickly. What humanitarian cannot feel a twinge of guilt at this monetary haggling over the life of a man confined for eight months in an underground tomb? Yet is it not unreasonable to ask that others pay out of their own pockets (and those others with whom they have a fiduciary relationship) to save the life of one who must be accounted, in the eyes of the law, a stranger to their interests? These are hard questions and the court did not have to answer them in *Curtis* although it must have been conscious of their lingering presence. What is important, here, is that it takes little imagination to envisage a case where these questions would be central to the judgment to be rendered. What is in issue is the price of human life. The kidnapper or hostage-taker poses a serious challenge to our sense of social and moral values. That challenge is strikingly exposed in the *Curtis* case and we may expect to see it recur in the future.¹⁸³ How that challenge is responded to will go a long way in determining the scope of hostage-rights.

XVI. CONCLUSIONS

The Reagan Administration has adopted a firm policy to combat international terrorism. We will resist terrorist blackmail and pursue terrorists with the full force of the law. We will not pay ransom, nor release prisoners, and we will not bargain for the release of hostages. To make concessions to terrorist blackmail only jeopardizes the lives and freedom of additional innocent people. We encourage other governments to take a similarly strong stance on terrorism. When American citizens are taken hostage, we look to the host government to exercise its responsibility under international law to protect them, but at the same time we urge the government not to give in to terrorist blackmail.¹⁸⁴

These are strong words, indeed, although they do not express any

general unwillingness to deal strategically with terrorism as a long-term issue."

¹⁸³ Statistics demonstrate the prevalence of these fears. "Thirty-nine percent (39 percent) of the respondents express concern that they, a family member, or a business associate will be kidnapped. Among the 43 percent of Fortune 1000 companies that have ties in countries where executives were already victimized, more than half of their key people say they live with these fears daily." Hayes, *International Terrorism & Violence: The Corporate Response*, POLICE CHIEF 122-24 (1982).

¹⁸⁴ Perez, *The Impact of International Terrorism*, 82 DEP'T ST. BULL. 55-57 (No. 2058, Jan. 1982).

original thoughts. The last sentence, however, contains an incongruity that is important to observe. The only way to protect the lives of the hostages may, in fact, be to give in to terrorist blackmail. To refuse to do so, or to take alternative action, may well be consigning the hostages to certain death. This ugly fact remains no matter how pleasantly it might be dressed up in diplomatic language. The position of the United States has been clearly stated. If other nations are urged to follow our policy it is certain that very little real protection can be given the hostage when he most needs it. What protection, it might be asked, could the government of the Republic of Colombia have given to Mr. Gustavo Curtis in his bare subterranean 4' x 8' cell? It is patently absurd to talk about protection under such circumstances, and the attitude of the Colombian authorities assumes a new realism in the light of such pious declaration. If the United States is moving to a position where it is prepared to sacrifice present hostages to save the lives of those who may be taken hostage in an uncertain future, then it should plainly state this position. If the statement does not mean what it says, and does not enshrine an operative policy along those lines, it will quickly be seen as a piece of unworthy hypocrisy, and tragedy will follow in its wake. If this policy position is to be taken at its face value, it raises the possibility of an incongruent schism between a public policy stated for external consumption but with obvious external application, and practices that are crystalizing in the domestic field. It also makes an incongruent distinction between the public and the private faces of the United States, long apparent to those familiar with these matters. How can the United States, in all conscience, urge foreign governments *not* to pay ransom, by way of example, when it refuses to attend to this anomaly in its own laws?

While in recent years, a remarkable expansion of the concept of hostage-rights and a constant extension of their protection in practical as well as legal terms has occurred, the attitude of the United States in the international forum has been incongruent with those developments. The observed direction has been hard-line abroad, and soft-line at home. It is confusing to those seeking to orient society's responses and it makes matters very uncertain for the American citizen who has the misfortune to be taken hostage abroad. A gang of international terrorists seizing hostages in New York City would be met by police officers whose policies and practices have been developed over a decade and whose emphasis on real negotiation has a proven record of success. Moreover, as members of the domestic law enforcement community they would be bound by the decision in *Downs* and would conduct themselves accordingly. If the FBI, the agency charged with managing incidents of domestic terrorism, responded to the event it too would be bound to follow *Downs*. Yet were American citizens seized by those same terrorists overseas, different considerations altogether would prevail. These policy positions are incompatible and the

law seems to be in danger of developing in directions that will be difficult to reconcile. The legal community must take a hard look at the incongruencies within the policy expressed in the headnote in order to bring back a much needed consistency.

